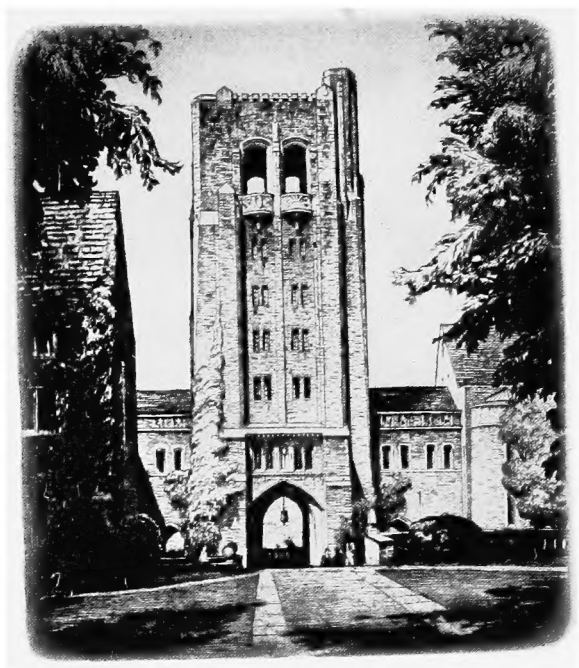


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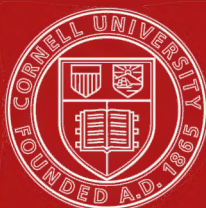
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A TREATISE
ON THE
LAW OF CARRIERS

AS
ADMINISTERED IN THE COURTS OF THE UNITED
STATES, CANADA AND ENGLAND

BY
ROBERT HUTCHINSON

THIRD EDITION

BY
J. SCOTT MATTHEWS
AND
WILLIAM F. DICKINSON
MEMBERS OF THE CHICAGO BAR

VOLUME III

CHICAGO
CALLAGHAN AND COMPANY
1906

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TABLE OF CONTENTS

VOLUME III.

[REFERENCES ARE TO SECTIONS.]

CHAPTER XII.

THE LIABILITY OF THE CARRIER AS AFFECTED BY THE CON- CURRING OR CONTRIBUTORY NEGLIGENCE OF THE PAS- SENGER.

Of contributory negligence generally.....	1170
Application of rule to carriers.....	1171
Difference in this respect between passenger and stranger.....	1172
Contributory negligence of passenger no excuse to carrier where injury could have been averted.....	1173
Contributory negligence usually a question of fact.....	1174
When a question of law.....	1175
Questions of mixed law and fact.....	1176
Alighting from train while in motion.....	1177
Same subject	1178
Same subject—View that attempt by passenger to alight from train while in motion is not necessarily a negligent act <i>per se</i>	1179
Same subject—How when danger obvious.....	1180
Getting on train while in motion.....	1181
Same subject—View that attempt by passenger to board train while in motion is not necessarily a negligent act <i>per se</i>	1182
Same subject—Negligence of passenger in boarding train while in motion no excuse for pushing him from platform.....	1183
Leaving or entering train elsewhere than on platform where one is provided	1184
Same subject—Effect of carrier's acquiescence or directions.....	1185
Leaving or entering train at place where no platform is provided..	1186
Alighting at an unusual place when train has stopped short of or has overshot platform.....	1187
Using ways for leaving or entering vehicles not intended for that purpose	1188
Same subject—Effect of carrier's acquiescence.....	1189
Alighting from steps of vehicle when danger obvious.....	1190
Using ways for leaving depot not intended for that purpose.....	1191
Passing from car to car while train is in motion.....	1192
Same subject—How when cars provided with vestibules.....	1193

[REFERENCES ARE TO SECTIONS.]

Occupying exposed position upon vehicle.....	1194
Same subject—Effect of carrier's acquiescence or directions.....	1195
Same subject—Occupying exposed position not a bar to recovery where it does not contribute to injury.....	1196
Voluntarily riding on platform while train in motion.....	1197
Same subject—How when car full.....	1198
Riding on platform to better escape impending danger—How when car unfit for physical comfort.....	1199
Riding in baggage or mail-car.....	1200
Riding in show-car.....	1201
Stockmen riding in stock-car.....	1202
Same subject—Passing over tops of cars while train is in motion..	1203
Same subject—Stockmen riding on engine.....	1204
Riding on hand-car.....	1205
Interfering with management of vehicles.....	1206
Using unsafe platforms on depot premises.....	1207
Occupying exposed positions upon railway company's premises...	1208
Exposure of person—Passenger projecting his limbs from car window	1209
Same subject—Such protrusions held negligence.....	1210
Same subject—The contrary view.....	1211
Same subject	1212
Same subject	1213
Same subject—No defense where it does not contribute to injury..	1214
Same subject—Protruding head through car window.....	1215
Whether standing in car is contributory negligence.....	1216
Same subject—Care to be exercised by passenger while riding on freight trains.....	1217
Riding upon engine.....	1218
Crossing tracks to reach or leave cars.....	1219
Crawling under trains to reach cars.....	1220
How far negligence excused by directions of carrier or his serv- ants	1221
Same subject—Directions by agent must be given while acting within scope of his authority.....	1222
Where the passenger is attempting to escape peril to which the carrier has exposed him.....	1223
Same subject—The test of the carrier's liability.....	1224
Avoiding an inconvenience to which the negligence of the carrier has exposed him.....	1225
Negligence on one kind of vehicle may not be on another.....	1226
Contributory negligence as affected by the infancy of the pas- senger	1227
Same subject—When negligence will be imputed to children.....	1228
Imputability of the negligence of those who have infants and imbeciles in charge.....	1229

[REFERENCES ARE TO SECTIONS.]

Contributory negligence, as affected by the intoxication of the passenger	1230
Contributory negligence as affected by the blindness or deafness of the passenger.....	1231
Traveling on Sunday.....	1232
Same subject	1233
Care to be exercised by passenger after having been wrongfully ejected from train or negligently carried beyond his destination	1234
Whether the negligence of the passenger's carrier is to be imputed to him when injured by the concurrent negligence of another— The former English rule of <i>Thorogood v. Bryan</i>	1235
Same subject—The English rule generally denied in the United States	1236
Same subject—English criticism of the rule.....	1237
Same subject—Final overthrow of the rule in England.....	1238
Summary of the rules upon the subject of this chapter.....	1239

CHAPTER XIII.

PASSENGERS' BAGGAGE.

Questions discussed in this chapter.....	1240
Carrier's liability for baggage.....	1241
What is baggage.....	1242
Same subject—Is whatever is usually carried as baggage.....	1243
Same subject—Articles for personal use during, or for ultimate purpose of journey.....	1244
Same subject—As to value.....	1245
Various articles held baggage.....	1246
Same subject—Bedding	1247
Same subject—A broad rule.....	1248
What is not baggage.....	1249
Effect of knowingly accepting articles not properly baggage, but which are tendered as such by the passenger.....	1250
Same subject—Authority of baggage-master to check merchandise as baggage	1251
Same subject—Massachusetts rule as to merchandise.....	1252
Baggage not limited to articles to be used on journey.....	1253
Articles appropriate or essential to purpose of journey.....	1254
The question of baggage, how determined.....	1255
Implied authority of baggage-master concerning baggage.....	1256
Liability when passenger retains possession of baggage.....	1257
Same subject—English cases—Must be clear that passenger assumes entire control.....	1258
Same subject—English cases—Question of delivery to carrier.....	1259

[REFERENCES ARE TO SECTIONS.]

Same subject—English cases—Passenger's contributory negligence.	1260
Same subject—Conclusion from last decision.....	1261
Same subject—English cases—Dissent from earlier authorities....	1262
Same subject—English cases—Bergheim v. Railway disapproved...	1263
Same subject—General result of American cases.....	1264
Same subject—Carrier not liable for wearing apparel in present use	1265
Same subject—Carrier liable for baggage retained by passenger in sleeping-car	1266
Same subject—Hand-bag dropped out of window.....	1267
Liability of carrier by water for baggage taken by the passenger into his stateroom.....	1268
Same subject—No liability for clothing, money or jewelry in cus- tody of passenger.....	1269
Same subject—Nor for any property in exclusive possession of pas- senger	1270
Same subject—New York rule as to the responsibility of the car- rier by water for baggage taken by passenger into his state- room	1271
Same subject—Passenger negligent, carrier not liable.....	1272
Sleeping and parlor-car companies.....	1273
Owner must be a passenger.....	1274
What is contract where baggage not accompanied by owner.....	1275
Where baggage is accompanied by a person other than the owner..	1276
Baggage of wife accompanied by husband—of child accompanied by parent	1277
When passenger need not accompany his baggage	1278
Baggage when carried as freight	1279
Passenger lying over—Baggage going on.....	1280
Delivery of baggage to carrier	1281
Liability of carrier for delivering baggage to wrong connecting carrier	1282
Same subject—Liability of connecting carrier	1283
Delivery of baggage at destination.....	1284
Passenger allowed reasonable time to call for baggage.....	1285
What is reasonable time	1286
* Same subject	1287
Same subject	1288
Same subject	1289
Same subject—Dissent from prevailing construction of "reason- able time"	1290
Strict liability of carrier succeeded by that of warehouseman.....	1291
Liability for negligence of subsidiary carrier	1292
Strict liability of carrier preserved where delay is caused by carrier	1293

[REFERENCES ARE TO SECTIONS.]

Delivery by carrier to transfer company—Delivery by transfer company	1294
Passenger's right to have baggage delivered at any regular station at which train stops	1295
Connecting carriers—Through contract.....	1296
Contracts limiting liability	1297
Same subject—Terms of limitation on baggage checks.....	1298
Same subject—Terms of limitation on passenger tickets.....	1299
Liability for baggage when passenger is carried gratuitously....	1300
Baggage checks	1301
What a baggage check implies	1302
The carrier's lien upon baggage	1303

CHAPTER XIV.

OF ACTIONS AGAINST COMMON CARRIERS.

I. THE PARTIES.

Who may sue the carrier for loss of or damage to the goods.....	1304
One having special property may sue	1305
Owner may sue	1306
Person making contract with the carrier may sue.....	1307
Same subject—Even if plaintiff have no interest in goods.....	1308
Same subject—States following this doctrine.....	1309
Same subject—Doctrine supported by English cases.....	1310
Same subject—Advantage of this rule.....	1311
Conclusions from previous cases.....	1312
Contract need not be in writing to enable shipper to sue.....	1313
The rule of these cases stated—Only owner may sue in tort.....	1314
Rule that only owner can sue.....	1315
Rule that mere agent without interest cannot sue.....	1316
When consignee may sue.....	1317
When consignor the proper party.....	1318
Same subject—Where sale is void, or where contract of sale is rescinded, consignor should sue.....	1319
Conclusions on this subject.....	1320

II. THE FORM OF ACTION.

The form of action.....	1321
Original theory as to carrier's obligation.....	1322
First recognition of the theory of the carrier's contract obligation..	1323
Action on the case	1324
Action in case is several and not joint.....	1325

[REFERENCES ARE TO SECTIONS.]

Advantage of declaring in case	1326
Action in assumpsit	1327
How character of action determined.....	1328
Same subject	1329
Distinction in form of action now generally unimportant.....	1330
When action should be upon the contract	1331
When action should be for breach of duty	1332

III. THE PLEADINGS.

Important to determine if plaintiff's declaration be in case or as- sumpsit	1333
What the declaration must allege.....	1334
When action is on the contract it must be set out correctly.....	1335
Same subject—Example of particularity requisite in declaring on contract	1336
Same subject—Variance between declaration and proof fatal.....	1337
Same subject—Whole contract must be stated.....	1338
Reasons for requiring particularity in declaring.....	1339
Mere collateral stipulations need not be stated	1340
Pleadings in action for statutory penalty for excessive charge.....	1341
How common-law action for excessive charge is affected by stat- utory action	1342
What is sufficient averment of an over-charge at common law....	1343
Statements as to the carrier's reward or compensation.....	1344
The carrier's defense to the action.....	1345

IV. THE EVIDENCE.

What must be proved by the plaintiff.....	1346
Plaintiff must show whose negligence caused loss.....	1347
Presumption that each of several connecting carriers received goods in same condition as when delivered to first carrier—Burden of proof to show contrary.....	1348
Same subject—Rule in Michigan	1349
Contract with carrier may be either express or implied.....	1350
Express contract not necessary—Delivery and acceptance enough..	1351
Plaintiff must produce some evidence of loss—What evidence will be sufficient	1352
What the carrier may show.....	1353
Rule that burden of proof is upon carrier to show no negligence..	1354
Rule that burden of proof as to negligence is upon the shipper....	1355
Importance of question	1356
Burden of proof where property injured consists of live-stock.....	1357

[REFERENCES ARE TO SECTIONS.]

V. THE MEASURE OF DAMAGES.

Difference in measure between actions of tort and contract.....	1358
The measure of damages for not accepting and carrying the goods..	1359
The measure of damages for the loss of the goods.....	1360
Same subject—Exceptions to the rule.....	1361
Measure of damages for injury to goods during transportation....	1362
Same subject—Measure of damages where goods not intended for sale or have no market value—Family portrait—Second-hand goods—Building plans	1363
Same subject—How when amount of loss limited by contract....	1364
Right of consignee to refuse to receive injured goods.....	1365
Damages for delay in the transportation and delivery.....	1366
Same subject—Special damages—Notice of special circumstances must be given to carrier when contract is made.....	1367
Same subject—Notice given after contract to carry has been per- formed	1368
Damages for delay in transporting articles intended for use in business	1369
Damages when carrier refuses to perform his contract to accept and carry the goods	1370
Same subject	1371
Delay not a conversion of the goods—Nor loss through mere non- feasance	1372
Damages for delay where the goods are not for sale as merchandise.	1373
Measure of damages for conversion of the goods—Mitigation of damages	1374
Damages for injury to, or delay in the shipment of bodies of de- ceased persons	1375

CHAPTER XV.

OF ACTIONS AGAINST CARRIERS FOR INJURIES TO
PASSENGERS.

I. COMMON-LAW ACTIONS.

Actions for injuries at common law	1376
Parent's right of action	1377
Same subject—Nature and extent of recovery	1378
Husband's right of action	1379
Relation of servitude necessary at common law	1380
Effect of child's contributory negligence on parent's action.....	1381
Effect of parent's contributory negligence on his own action.....	1382
Effect of negligence of husband or wife on the other's action.....	1383

[REFERENCES ARE TO SECTIONS.]

II. STATUTORY ACTIONS.

Statutory right of action in case of death	1384
Same subject—Similar acts in the United States.....	1385
Whether statute gives a new right of action.....	1386
Extraterritorial effect of these statutes	1387
When right of action created in one state may be prosecuted in other states	1388
Who may sue under these statutes	1389
Who may sue when action is brought in state other than one where death is caused	1390
Effect of deceased's contributory negligence or his settlement of the action	1391
Effect of beneficiaries' contributory negligence or release.....	1392
What law governs as to the effect of contributory negligence or of a release	1393
When existence of kin must be shown	1394
Who included among beneficiaries—Aliens—Posthumous and ille- gitimate children—Grandchildren	1395
Effect of time limitation	1396
Measure of damages	1397
No damages for mental suffering of beneficiaries.....	1398
Nominal damages	1399
Punitive damages ordinarily not recoverable.....	1400
Province of jury in allowing damages	1401
Distribution of damages recovered	1402

III. OF ACTIONS IN GENERAL.

1. *The form of action.*

Form of action optional	1403
Form of action when exemplary damages are claimed.....	1404
Form when brought by personal representative.....	1405
Recovery must be for cause of action stated.....	1406
How form of action is determined.....	1407
Same subject	1408

2. *The pleadings.*

Special damages must be pleaded	1409
Same subject	1410

3. *The evidence.*

Proof of the carrier's negligence	1411
Presumptions as to negligence	1412
When the fact of the injury is <i>prima facie</i> evidence of negligence	1413

[REFERENCES ARE TO SECTIONS.]

Same subject	1414
Proof of injury usually makes a <i>prima facie</i> case of negligence....	1415
Same subject—How where passenger agrees to assume risk of accident	1416
Contributory negligence of passenger—Burden of proof on defendant	1417
Same subject—Cases holding that burden of proof is on plaintiff..	1418
To defeat recovery plaintiff's negligence must have been a proximate cause of injury	1419
How question of contributory negligence determined.....	1420

4. *The measure of damages.*

Measure of damages is generally compensation for injury.....	1421
Compensation for pain and suffering.....	1422
Future damages may be considered.....	1423
Inconvenience may be considered.....	1424
Suffering must be real	1425
Measure of damages for delay in transporting the passenger.....	1426
Damages for mental suffering.....	1427
Damages must be proximate and natural consequence of the injury	1428
Same subject—The more liberal rule.....	1429
Same subject—How question determined.....	1430
Passenger must seek to make his damage as light as possible....	1431
Effect of previous sickness or disease.....	1432
Damages in case of maltreatment—Ejection from train.....	1433
Same subject—How when maltreatment is provoked by insulting language or violent conduct of passenger.....	1434
Exemplary or punitive damages against carriers	1435
On what theory allowed.....	1436
When allowed for carrier's neglect of duty in furnishing safe vehicles, tracks, etc.....	1437
When exemplary damages allowed for reckless acts of carrier's servants	1438
Same subject	1439
Same subject—The more liberal rule	1440
When allowed for active maltreatment of passenger.....	1441
Same subject—The more liberal rule	1442
Same subject—Effect of servant's good faith.....	1443
Same subject—Evidence of authority or ratification.....	1444
Same subject—Carrier only liable where servant would have been..	1445
When carrier may disprove wrongful intent.....	1446

THE LAW OF CARRIERS

CHAPTER XII.

THE LIABILITY OF THE CARRIER AS AFFECTED BY THE CONCURRING OR CONTRIBUTORY NEGLIGENCE OF THE PASSENGER.

- | | |
|---|---|
| <p>§ 1170. Of contributory negligence generally.</p> <p>1171. Application of rule to carriers.</p> <p>1172. Difference in this respect between passenger and stranger.</p> <p>1173. Contributory negligence of passenger no excuse to carrier where injury could have been averted.</p> <p>1174. Contributory negligence usually a question of fact.</p> <p>1175. When a question of law.</p> <p>1176. Questions of mixed law and fact.</p> <p>1177. Alighting from train while in motion.</p> <p>1178. Same subject.</p> <p>1179. Same subject—View that attempt by passenger to alight from train while in motion is not necessarily a negligent act <i>per se</i>.</p> <p>1180. Same subject—How when danger obvious.</p> <p>1181. Getting on train while in motion.</p> <p>1182. Same subject—View that attempt by passenger to board train while in motion is not necessarily a negligent act <i>per se</i>.</p> | <p>§ 1183. Same subject—Negligence of passenger in boarding train while in motion no excuse for pushing him from platform.</p> <p>1184. Leaving or entering train elsewhere than on platform where one is provided.</p> <p>1185. Same subject—Effect of carrier's acquiescence or directions.</p> <p>1186. Leaving or entering train at place where no platform is provided.</p> <p>1187. Alighting at an unusual place when train has stopped short of or has overshot platform.</p> <p>1188. Using ways for leaving or entering vehicles not intended for that purpose.</p> <p>1189. Same subject—Effect of carrier's acquiescence.</p> <p>1190. Alighting from steps of vehicle when danger obvious.</p> <p>1191. Using ways for leaving depot not intended for that purpose.</p> <p>1192. Passing from car to car while train is in motion.</p> <p>1193. Same subject—How when cars provided with vestibules.</p> |
|---|---|

- § 1194. Occupying exposed position upon vehicle.
- 1195. Same subject—Effect of carrier's acquiescence or directions.
- 1196. Same subject—Occupying exposed position not a bar to recovery where it does not contribute to injury.
- 1197. Voluntarily riding on platform while train in motion.
- 1198. Same subject—How when car full.
- 1199. Riding on platform to better escape impending danger—How when car unfit for physical comfort.
- 1200. Riding in baggage or mail-car.
- 1201. Riding in show-car.
- 1202. Stockmen riding in stock-car.
- 1203. Same subject—Passing over tops of cars while train is in motion.
- 1204. Same subject—Stockmen riding on engine.
- 1205. Riding on hand-car.
- 1206. Interfering with management of vehicles.
- 1207. Using unsafe platforms on depot premises.
- 1208. Occupying exposed positions upon railway company's premises.
- 1209. Exposure of person—Passenger projecting his limbs from car window.
- 1210. Same subject—Such protrusions held negligence.
- 1211. Same subject—The contrary view.
- 1212. Same subject.
- § 1213. Same subject.
- 1214. Same subject—No defense where it does not contribute to injury.
- 1215. Same subject—Protruding head through car window.
- 1216. Whether standing in car be contributory negligence.
- 1217. Same subject—Care to be exercised by passenger while riding on freight trains.
- 1218. Riding upon engine.
- 1219. Crossing tracks to reach or leave cars.
- 1220. Crawling under trains to reach cars.
- 1221. How far negligence excused by directions of carrier or his servants.
- 1222. Same subject—Directions by agent must be given while acting within scope of his authority.
- 1223. Where the passenger is attempting to escape peril to which the carrier has exposed him.
- 1224. Same subject—The test of the carrier's liability.
- 1225. Avoiding an inconvenience to which the negligence of the carrier has exposed him.
- 1226. Negligence on one kind of vehicle may not be on another.
- 1227. Contributory negligence as affected by the infancy of the passenger.
- 1228. Same subject—When negligence will be imputed to children.

- | | |
|---|--|
| <p>§ 1229. Imputability of the negligence of those who have infants and imbeciles in charge.</p> <p>1230. Contributory negligence, as affected by the intoxication of the passenger.</p> <p>1231. Contributory negligence as affected by the blindness or deafness of the passenger.</p> <p>1232. Traveling on Sunday.</p> <p>1233. Same subject.</p> <p>1234. Care to be exercised by passenger after having been wrongfully ejected from train or negligently carried beyond his destination.</p> | <p>§ 1235. Whether the negligence of the passenger's carrier is to be imputed to him when injured by the concurrent negligence of another—The former English rule of <i>Thorogood v. Bryan</i>.</p> <p>1236. Same subject—The English rule generally denied in the United States.</p> <p>1237. Same subject—English criticism of the rule.</p> <p>1238. Same subject—Final overthrow of the rule in England.</p> <p>1239. Summary of the rules upon the subject of this chapter.</p> |
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Sec. 1170. (§ 635.) Of contributory negligence generally.

—That a person who, by his own fault or negligence, has brought upon himself a loss or an injury, can claim no compensation for it from another, is a principle of universal application; and it is equally true that, if his imprudence or negligence has so materially contributed to the loss or injury that it may be regarded as in any degree a proximate and natural cause of the injury complained of, he can claim no recompense from another who has been instrumental in causing it. If, in other words, the injury, though inflicted by another, was contributed to naturally and proximately by the situation of peril into which the party by his own neglect had placed himself, he must be considered as the party solely in fault, and as the author of his own misfortune.

Sec. 1171. (§ 636.) Application of rule to carriers.—This principle of contributory negligence is one which of late years public carriers of passengers have very frequently invoked in their defense against the attempts of persons, passengers as well as others, who have sustained personal injuries from them in the conduct of their business, to hold them liable therefor. So far as strangers to the carrier are concerned, his liability,

when there has been such concurring negligence, depends upon the same considerations which apply in other cases in which the relation of the parties to each other is that of strangers. But when the question is as to his liability to his passengers, and there has been mutual negligence, another element enters into the case. The carrier owes no especial duty to a stranger, or one who is not a passenger, beyond that general duty to so conduct himself and his business as not unnecessarily to cause damage to another, which is the common principle of humanity as well as of law, which all are bound to observe in their conduct. When, therefore, the inquiry is whether the carrier has exercised the proper diligence in avoiding an injury to one who does not stand towards him in the relation of passenger, but who has negligently or incautiously exposed himself to danger, it will be necessary to consider and apply only the general rules which govern when the parties stand under no obligations of duty to each other, except such as are due from one stranger to another.

Sec. 1172. (§ 637.) Difference in this respect between passenger and stranger.—But, as we have seen, he owes to his passenger not only the duty of transportation, but that of exercising for his safety the utmost care and diligence compatible with the nature of the carriage, and the further duty of protecting him against the assaults and trespasses of other passengers and of strangers while upon his conveyance. He owes him the still further duty, as has been shown, of warning him against danger when it is at hand, and of cautioning him against acts of imprudence which may endanger his person, whenever the circumstances are such that the safety of the passenger would seem to require it. It is evident, therefore, that, as between passenger and carrier, the negligence of the former will not always protect the carrier from liability, however much it may have contributed to cause his injury.

Sec. 1173. Contributory negligence of passenger no excuse to carrier where injury could have been averted.—While in general, therefore, it may be stated that the passenger will be

barred from the right to a recovery if his own negligence in exposing himself to danger has concurred in causing the injury, such right will not be barred if the carrier, after becoming aware of the exposed position of the passenger, failed to exercise a reasonable degree of care and caution to avert the injury. The imprudence of the passenger in placing himself in a situation of peril does not dissolve the contract of carriage, nor relieve the carrier from the duty of protection which the passenger may rightfully demand under it. If, therefore, the passenger negligently exposes himself to danger, and the carrier knows, or under the circumstances ought to know of the danger to which he is exposed, it is the carrier's duty to exercise such reasonable care and caution as the situation of the passenger demands to protect him from injury.¹ And if, with

1. *Carrico v. The Railroad*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; *Holmes v. The Railway*, 97 Cal. 161, 31 Pac. Rep. 834; *Railroad Co. v. Brown*, 77 Miss. 338, 28 So. Rep. 949; *Transit Co. v. Dwyer*, 3 Colo. App. 408, 33 Pac. Rep. 815; *Wheeler v. The Railway*, 70 N. H. 607, 50 Atl. Rep. 103, 54 L. R. A. 955; *Kries v. The Railway*, 131 Mo. 533, 33 S. W. Rep. 64; *Rodgers v. Railroad Co.*, — Ark. —, 89 S. W. Rep. 468, 1 L. R. A. (N. S.) 1145.

Although the passenger is chargeable with negligence in stepping or falling from a rapidly moving train, if the servants in charge of the train have notice that he has fallen from the train upon the track where he is exposed in a helpless condition to danger from other trains, the carrier will be guilty of negligence if the servants fail to stop the train and remove him from the track, or adopt some other reasonable precaution to protect him from in-

jury. *Cincinnati, etc. R. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. Rep. 282, 16 L. R. A. 674.

Where the servants in charge of a small boat used in conveying passengers from a point on shore to a steamship, attempt to convey a boat load of passengers to the steamship with knowledge that the boat is loaded beyond its capacity, and the boat swamps causing a passenger to drown, the carrier will be liable although the passengers were guilty of negligence in refusing to leave the boat when requested to do so by the carrier's servants. *Weisshaar v. Kimball Steamship Co.*, 128 Fed. 397, 63 C. A. 139, 65 L. R. A. 84, reversing *In re Kimball Steamship Co.*, 123 Fed. 838.

While a passenger, who is standing beside an open door of a railway car, may be chargeable with negligence in placing his hand in a position where it is likely to be caught by the sudden closing of the door, if the

knowledge that the passenger has assumed a position of danger, the carrier omits to exercise such reasonable care and caution to avoid causing him injury, such omission will be considered in law the proximate cause of the injury, and the carrier will be liable, notwithstanding the prior negligence of the passenger.

Sec. 1174. (§ 638.) Contributory negligence usually a question of fact.—Where the question whether the negligence of the passenger did, in fact, proximately and naturally contribute to the injury, depends for its determination upon conflicting testimony, it must be submitted to the jury as a question of fact. And although the facts have been ascertained, if they are such that fairminded men might honestly come to different conclusions as to the injury sustained by the passenger having been contributed to by his own carelessness or imprudence, the question of his contributory negligence must be determined as one of fact by the jury.²

employees on the car have knowledge of the position of his hand, and regardless of consequences close the door and injure his hand, the railway company will be liable. *Texas, etc. R'y Co. v. Overall*, 82 Tex. 247, 18 S. W. Rep. 142.

For cases where the passenger was injured while negligently walking upon or near the railroad tracks, see *Holmes v. The Railway*, and *Kreis v. The Railway*, *supra*. See also, *Railway Co. v. Bolton*, 2 Ind. Terr. 463, 51 S. W. Rep. 1085, where the passenger sat down on the edge of the station platform and was struck by an incoming train.

2. *England*: *Robson v. The Railway*, L. R. 10 Q. B. 271; s. c. L. R. 2 Q. B. Div. 85.

United States: *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct.

R. 748, 37 L. Ed. 642; *Bronson v. Oakes*, 76 Fed. Rep. 734, 22 C. C. A. 520; *Sprague v. The Railway*, 92 Fed. Rep. 59, 34 C. C. A. 207.

Alabama: *North Birmingham, etc. R. Co. v. Calderwood*, 89 Ala. 247; *Alabama, etc. R. Co. v. Arnold*, 80 Ala. 600.

Arkansas: *Railway Co. v. Baker*, 67 Ark. 531, 55 S. W. Rep. 941.

California: *McQuilken v. The Railroad*, 64 Cal. 463; *Dufour v. The Railroad*, 67 Cal. 319.

Colorado: *Railroad Co. v. Spencer*, 27 Colo. 313, 61 Pac. Rep. 606, 51 L. R. A. 151; *Colorado, etc. R. Co. v. Holmes*, 5 Colo. 197.

Indiana: *Railroad Co. v. Bean*, 9 Ind. App. 240, 36 N. E. Rep. 443.

Iowa: *Henry v. The Railway*, 66 Iowa, 52, *Watson v. The Railway*,

Sec. 1175. (§ 639.) When a question of law.—Where, however, the facts are not in dispute, and these facts, as admitted or proved, show so clearly that the plaintiff's own negligence has or has not proximately and naturally contributed to the

66 Iowa, 164; *Lennon v. The Railway*, — Iowa, —, 75 N. W. Rep. 671.

Massachusetts: *McKimble v. The Railroad*, 139 Mass. 542; *Barden v. The Railroad*, 121 Mass. 426; *Sonier v. The Railroad*, 141 Mass. 10; *Comerford v. The Railroad*, 181 Mass. 528, 63 N. E. Rep. 936.

Maryland: *Philadelphia, etc. R. Co. v. McGugan*, — Md. —, 62 Atl. Rep. 752.

Michigan: *Palmer v. The Railroad*, 57 Mich. 1.

Missouri: *Swigert v. The Railroad*, 75 Mo. 475.

Nebraska: *Railway Co. v. Crow*, 47 Neb. 84, 66 N. W. Rep. 21.

New Hampshire: *Edgerly v. The Railroad*, 67 N. H. 312, 36 Atl. Rep. 558.

New Jersey: *Kulman v. The Railroad*, 65 N. J. Law, 241, 47 Atl. Rep. 497; *Young v. The Railroad*, 60 N. J. Law, 193, 37 Atl. Rep. 1013; *McCann v. The Railroad*, 58 N. J. Law, 642, 34 Atl. Rep. 1052, 33 L. R. A. 127; *Orange, etc. R. Co. v. Ward*, 47 N. J. Law, 560.

New York: *Solomon v. The Railroad*, 103 N. Y. 437; *Baker v. The Railroad*, 118 N. Y. 533; *Filer v. The Railroad*, 49 N. Y. 47; *Morrison v. The Railroad*, 56 N. Y. 302; *Thurber v. The Railroad*, 60 N. Y. 326; *Maher v. The Railroad*, 67 N. Y. 52; *Wimbleberg v. The Railroad*, 81 N. Y. Supp. 963; 83 App. Div. 19; *Onderdonk v. The Railroad*, 74 Hun, 42, 26 N. Y. Supp. 310.

North Carolina: *Hinshaw v. The Railroad*, 118 N. Car. 1047, 24 S. E. Rep. 426; *Kirk v. The Railroad*, 97 N. Car. 82; *Ray v. Railroad Co.*, — N. Car. —, 53 S. E. Rep. 622.

Pennsylvania: *Reddington v. Traction Co.*, 132 Penn. St. 154; *Coburn v. The Railroad*, 198 Penn. St. 436, 48 Atl. Rep. 265; *Rathgebe v. The Railroad*, 179 Penn. St. 31, 36 Atl. Rep. 160; *Johnson v. The Railroad*, 70 Penn. St. 357; *Kay v. The Railroad*, 65 Penn. St. 273; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30.

South Carolina: *Zemp v. The Railroad*, 9 Rich. Law, 84.

Texas: *Kansas, etc. R'y Co. v. Dorrough*, 72 Tex. 108; *Texas, etc. R. Co. v. Murphy*, 46 Tex. 356; *International, etc. R'y Co. v. Ormond*, 64 Tex. 485; *Williams v. Railway Co.*, (Tex. Civ. App.) 78 S. W. Rep. 45; *San Antonio, etc. R'y Co. v. Turney*, (Tex. Civ. App.) 78 S. W. Rep. 256.

Vermont: *Sullivan v. Canal Co.*, 72 Vt. 353, 47 Atl. Rep. 1048; *Worthington v. The Railroad*, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326.

West Virginia: *Fisher v. The Railroad*, 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758.

Wisconsin: *Spencer v. The Railroad*, 17 Wis. 487; *Leavitt v. The Railroad*, 64 Wis. 228.

It seems to have been a subject of considerable controversy with the English judges and lawyers, whether the question of contrib-

utory negligence, and its effect in relieving the carrier from responsibility, was one of law for the court or of fact for the jury. The manner in which it was finally settled is explained in what was said by Brett, J., in *Robson v. The Railway*, L. R. 2 Q. B. Div. 85. "It appears to me," said he, "that the judgment of the house of lords, in *Bridges v. The North London R'y Co.*, puts an end to a long controversy; not as to the law, but as to the mode of dealing with these cases. Some of the judges seem to have been of opinion that these cases should, as much as possible, be withdrawn from the jury, and that the court ought to say what was reasonable for the passenger to do. The house of lords held that, as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury was the proper tribunal to decide. *Siner v. The Great Western R'y Co.* was decided in the heat of the controversy, and, without saying it ought to be overruled, I may say that it was decided by judges who thought that these cases ought to be left to the judge and not to the jury. The house of lords has decided that they are to be left to the jury; and the judgment of the queen's bench in this case is put upon this ground, that the passenger did remain so long that she might reasonably suppose that if she did not get down she would be carried on, and unless there was danger to her life, she was justified in getting down. The jury were entitled to say whether, on such facts, there was negligence on the part of the company."

According to this rule the sole province of the court is to determine whether the proof will justify giving the case to the jury, or whether, there being a total absence of such proof, the court should not order a nonsuit. *Rose v. The Railway*, L. R. 2 Exch. Div. 248; *Robson v. The Railway*, *supra*. "The question of negligence, if there be any evidence to be submitted to the jury, is for the jury alone, and must be decided by the jury as a question of fact. Judges must therefore now be careful both in deciding whether there is evidence to be left to the jury, and whether the verdict is in accordance with the evidence; as also, that in so deciding, they do not permit their individual views on the subject of negligence to control or supersede the decision of the jury on a matter which it is exclusively the province of a jury to determine as a question of fact." Per Cockburn, C. J., in *Jackson v. The Railway Co.*, L. R. 2 Com. P. Div. 125.

In Illinois, it was formerly allowed juries to apportion the negligence of the plaintiff and defendant as is done in cases of marine torts. If both parties were equally in fault, or nearly so, the plaintiff could not recover. But if both parties were negligent and the plaintiff's negligence was only slight while that of the defendant was gross in comparison, the plaintiff was permitted to recover. *Chicago, etc. R. R. Co. v. Van Patten*, 64 Ill. 510; *Ill. Cent. R. R. Co. v. Green*, 81 Ill. 19; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590. But this doctrine is declared in later cases to be

injury that there can be no reasonable difference of opinion in regard to it, the question of the defendant's liability may properly be decided by the court as a question of law.¹

Sec. 1176. (§ 640.) Questions of mixed law and fact.—Certain rules upon the subject have, however, become established as to particular kinds or acts of negligence on the part of the passenger, from their frequent recurrence before the courts, upon which many, perhaps most, of the questions which may arise must be disposed of. Such questions are consequently frequently said to be mixed questions of law and fact. These rules are therefore of the highest importance to the carrier as well as to the passenger who seeks redress for the injury which he has sustained at his hands. Some of the most important of these will now be considered.

Sec. 1177. (§ 643.) Alighting from train while in motion.—The question whether an attempt by the passenger to alight from a railway train while it is moving by a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time for him to leave it, will, as a matter of law, be such evidence of contributory negligence on his part as will preclude him from the right to a recovery if an injury is thereby suffered, has been decided differently by different courts. It is held by a number of courts that any attempt by the passenger to alight from a railway train which he knows, or under the circumstances ought to know is in motion, un-

obsolete. *Pioneer Const. Co. v. The Railroad*, 24 Vt. 487; *Harsunderland*, 188 Ill. 345; *West* *ing v. The Railroad*, 13 Barb. 9; *Chicago, etc. R'y Co. v. Liderman*, *Gahagan v. The Railroad*, 1 Allen, 187 Ill. 469; *Wenona Coal Co. v. 187; Gavett v. The Railroad*, 16 Holmquist, 152 Ill. 592; *L. S. & Gray*, 501; *Railroad v. Shipley*, 31 Md. 368; *Pittsburgh, etc. R. R. v. Hessions*, 150 Ill. 556; *Calumet Iron, etc. Co. v. v. Andrews*, 39 *id.* 329; *Pittsburgh, etc. R. R. v. McClurg*, 56 *v. Feehan*, 149 Ill. 214, 36 N. E. Penn. St. 294; *Matthews v. Railway Co.*, 26 Mo. App. 75; *Goodlett v. Railroad Co.*, 122 U. S. 391; *1. McMurtry v. Railway Co.*, 67 Miss. 601; *Richmond, etc. R. Co. v. Pickleseimer*, 85 Va. 798; *Trow Railroad Co.*, 119 Ill. App. 393.

less he is induced to make the attempt by some act or conduct on the part of the employees of the railway company which naturally tends to interfere to some extent with his free agency, or unless he is invited or directed to alight by an agent or servant acting in the line of his duty, is a negligent act *per se*, and precludes the passenger from the right to recover for the injury which may be thereby occasioned.² "As we now understand the rule established by the decisions," said the court of appeals of New York in the case of *Solomon v. The Railway*,³ "it is presumptively a negligent act for a passenger

2. *Victor v. The Railroad*, 164 Penn. St. 195, 30 Atl. Rep. 381; *Brown v. The Railroad*, 181 Mass. 365, 63 N. E. Rep. 941; *Jacob v. The Railroad*, 105 Mich. 450, 63 N. W. Rep. 502; *Newlin v. The Railway*, 127 Iowa, 654, 103 N. W. Rep. 999; *Burgin v. The Railroad*, 115 N. Car. 673, 20 S. E. Rep. 473; *Scully v. The Railroad*, 80 Hun, 197, 30 N. Y. Supp. 61; *Mearns v. The Railroad*, 163 N. Y. 108, 57 N. E. Rep. 292, *reversing s. c.* 48 N. Y. Supp. 366, 23 App. Div. 298; *Hunter v. The Railroad*, 126 N. Y. 18, 26 N. E. Rep. 958; *Brown v. The Railroad*, 80 Wis. 162, 49 N. W. Rep. 807; *Schiffler v. The Railway*, 96 Wis. 141, 71 N. W. Rep. 97, 65 L. R. A. 35; *Railroad Co. v. Dufrain*, 36 Ill. App. 352; *Railroad Co. v. Johnson*, 44 Ill. App. 56; *Railroad Co. v. Kennicott*, 68 Ill. App. 90; *Railroad Co. v. Cunningham*, 102 Ill. App. 206; *Railway Co. v. Miller*, 33 Ind. App. 128, 70 N. E. Rep. 1006; *McDonald v. The Railroad*, 87 Me. 466, 32 Atl. Rep. 1010; *Mearns v. Railroad Co.*, 139 Fed. 543; *Hewes v. Railroad Co.*, 119 Ill. App. 393.

While ordinarily, an attempt by the passenger to alight from a

moving train is a negligent act *per se*, it cannot be said that he is thereby chargeable with contributory negligence where he has no knowledge that the train is in motion. Whether he does or does not know that the train is in motion is a question for the jury. *Walters v. The Railway*, 113 Wis. 367, 89 N. W. Rep. 140. It cannot be said as a matter of law that in the evening at a dimly lighted station, a train might not start so quietly that a passenger might go out upon the platform and attempt to get off without knowing that the train was in motion. *Merritt v. The Railroad*, 162 Mass. 326, 38 N. E. Rep. 447. 3. 103 N. Y. 437.

The mere fact that the train fails to stop, as was its duty or as the conductor promised to do, does not justify the passenger in leaping off, unless invited to do so by the carrier's agents, and the attempt was not obviously dangerous. *Walker v. Railroad Co.*, 41 La. Ann. 795; *Jewell v. Railway Co.*, 54 Wis. 610; *Richmond, etc. R. Co. v. Morris*, 31 Gratt. 200; *Nelson v. Railroad Co.*, 68 Mo. 593; *New York, etc. R. Co. v. Enches*, 127 Penn. St. 316;

to attempt to alight from a moving train, and it is not sufficient to rebut the presumption that the trainmen acquiesced in the action of the passenger, or that the company violated its duty or contract in not stopping the train, or that to remain on the train would subject the passenger to trouble or inconvenience; but that to excuse such an act and free the plaintiff from the charge of contributory negligence, there must be a coercion of circumstances which did not leave the passenger in the free and untrammelled possession of his faculties and judgment." But if by the conduct of the employees of the railway company, or by the invitation or direction of an agent acting in the line of his duty, the passenger is induced to make the attempt to alight from the train while it is in motion, and the danger of such a course is not obvious and apparent, he will not, in attempting to so alight, be chargeable with contributory negligence as a matter of law, and the question whether he acted as a person of reasonable prudence would have acted under the circumstances should be submitted to the jury.⁴

East Tennessee, etc. R. Co. v. Massengill, 15 Lea, 328; Nichols v. Railway Co., 68 Iowa, 732; Houston, etc. R'y Co. v. Leslie, 57 Tex. 83; Jarrett v. Railway Co., 83 Ga. 347; Porter v. Railway Co., 80 Mich. 156; Kansas City R. Co. v. Fite, 67 Miss. 373; Watson v. Railway Co., 81 Ga. 476; Kilpatrick v. Railroad Co. (Penn.), 21 Atl. Rep. 405; Little Rock, etc. R'y Co. v. Tankersly, 54 Ark 25, 14 S. W. Rep. 1099.

The mere desire to prevent anxiety on the part of those who are expecting him will not justify the passenger in leaping from a moving train. Lake Shore R'y Co. v. Bangs, 47 Mich. 470.

A *fortiori* can he not recover where he jumps off voluntarily (Whelan v. Railroad Co., 84 Ga. 506); or before it is time for the

train to stop (Savannah, etc. R'y Co. v. Watts, 82 Ga. 229; Paterson v. Railroad Co., 85 Ga. 653, 11 S. E. Rep. 872); or where he delays until after the train has stopped a reasonable time and has again started (Central, etc. R. Co. v. Letcher, 69 Ala. 106). The facts that the name of the station has been called, that the door has been opened and that other passengers are getting out, do not excuse a passenger for attempting to alight while the train is still in motion. England v. Railroad Co., 153 Mass. 490, 27 N. E. Rep. 1.

4. Lewis v. Canal Co., 145 N. Y. 508, 40 N. E. Rep. 248, *reversing*, 80 Hun, 192, 30 N. Y. Supp. 28; McCaslin v. The Railway, 93 Mich. 553, 53 N. W. Rep. 724; Galloway v. The Railway, 87 Iowa,

Thus in *Filer v. The Railroad*,⁵ it appeared that the plaintiff, whilst the cars were moving slowly by the station which was her destination, being assured by the brakeman that they would not stop, and advised by him to get off, undertook to

458, 54 N. W. Rep. 447; *Larson v. The Railroad*, 85 Minn. 387, 88 N. W. Rep. 994; *Johnson v. The Railroad*, 130 N. Car. 488, 41 S. E. Rep. 794; *Railway Co. v. Bandy*, 120 Ga. 463, 47 S. E. Rep. 923, 102 Am. St. Rep. 112; *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435, 4 U. S. App. 264; s. c. 163 U. S. 685; *Railway Co. v. Shelton*, 30 Tex. Civ. App. 72, 69 S. W. Rep. 653; s. c. 70 S. W. Rep. 359; *International, etc. R'y Co. v. Rhoades*, (Tex. Civ. App.) 51 S. W. Rep. 517; *Railway Co. v. Bingham*, 2 Tex. Civ. App. 278, 21 S. W. Rep. 569; *Leggett v. The Railroad*, 143 Penn. St. 39, 21 Atl. Rep. 996; *Baltimore, etc. R. Co. v. Mullen*, 217 Ill. 203, 75 N. E. Rep. 474; *Fore v. Railway Co.*, — Miss. —, 39 So. Rep. 493; *Staines v. Railroad Co.*, — N. J. L. —, 61 Atl. Rep. 385.

But where the passenger is expressly warned not to alight until the train has stopped, he cannot recover if, in attempting to do so, he is injured. *Harvey v. Railway Co.*, — Ill. —, 77 N. E. Rep. 569.

A brakeman, whose duty it is to assist passengers to alight and to call stations, is acting within the scope of his agency in directing a passenger, who is being carried past his station, to alight from the train. *Owens v. The Railway*, 84 Mo. App. 143. But a flagman has no such implied authority. *Savannah, etc. R'y Co. v. Wall*, 96 Ga. 328, 23 S. E. Rep.

197. Nor has a baggage-master. *Railroad Co. v. Decker*, 14 Ky. Law Rep. 108.

There is an essential difference between a direction by a brakeman in the nature of a requirement, and a direction in the nature of advice or information. For injury resulting from the former, a railroad company may be liable; but it is not responsible for directions in the nature of information or advice given the passenger. *Railway Co. v. Gray*, 28 Ind. App. 588, 64 N. E. Rep. 39, citing, *Vimont v. The Railroad*, 71 Iowa, 58, 32 N. W. Rep. 100; *Lindsey v. The Railroad*, 64 Iowa, 407, 20 N. W. Rep. 737.

A remark by the conductor, as, "Jump with the train," or, "Don't jump sideways," will not be construed as a direction to alight. *McDonald v. The Railroad*, 87 Me. 466, 32 Atl. Rep. 1010.

Where the passenger is injured while attempting to alight from a moving train, the burden of proof will be on him to show the circumstances upon which he relies to excuse his conduct. *McDonald v. The Railroad*, *supra*. Where the conductor violently threatens to eject the passenger while the train is in motion, the negligence of the passenger in attempting to alight will be excused. *Bogges v. Railway Co.*, 37 W. Va. 297, 16 S. E. Rep. 525, 23 L. R. A. 777.

5. 49 N. Y. 47; s. c. 59 N. Y. 351; s. c. 68 N. Y. 124.

do so and was injured, and it was held that she was entitled to recover. "It is true," said the court, "there was no absolute necessity for this act; but she was called upon to decide upon the instant, and under peculiar circumstances, and ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong." But the case was made to turn principally upon the fact that she had been advised to the course she pursued by the brakeman, who was held, in what he did, to be acting in the line of his duty; and a number of cases were cited to sustain this position.⁶

Sec. 1178. Same subject.—So in the case of *The Pennsylvania Railroad Co. v. Kilgore*,⁷ the plaintiff, who was sick and feeble, had taken passage with her three children to Greensburg. Upon the arrival of the train at her destination, two of the children alighted from the car, and the plaintiff, with the other child, was preparing to alight, when the train started. She sprang, notwithstanding, upon the platform, but in doing so fell between the cars and the platform, and was seriously injured. It was held that she was entitled to recover, and Woodward, J., in giving the judgment of the court, said: "Whilst there is no doubt about the doctrine of concurrent negligence, which the learned counsel invokes, the circumstances of this case scarcely admit of its application. The company, as public transporters, took the plaintiff and her three children aboard of their cars at Pittsburg under a contract to set them down safely at Greensburg. That it was their duty to stop long enough to let these passengers off at the point of destination is not denied, and that they failed in performing this duty is established by the verdict. . . . It is an established fact that the company did not give her, in the actual circumstances in which she was placed, reasonable time to leave the cars in safety. . . . That it is wrong for a party

6. *McIntyre v. The Railroad*, 37 N. Y. 287; *Foy v. The Railway*, 18 Com. B. (N. S.) 225; *Siner v. The Railway*, L. R. 3 Exch. 150; *McSloop v. The Railroad*, 59 Fed. 431; *Railroad Co. v. Richerson*, 14 Ky. Law Rep. 925.
7. 32 Penn. St. 292.

to attempt to leave cars whilst they are in motion is an abstract truth, that counsel complain of the court for not misapplying here. It is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed. It was as natural for this woman to leave the cars as she did, in her circumstances, as it was rash for Aspell to leap from them in his circumstances. It would be as unreasonable to impute negligence to her as it would have been to have held the company responsible to him.''⁸

Sec. 1179. Same subject—View that attempt by passenger to alight from train while in motion is not necessarily a negligent act per se.—Although, as we have seen, a number of courts follow the rule that, in the absence of special circumstances excusing such conduct, the passenger will never be justified in attempting to alight from a railway train while it is in motion, the weight of modern authority seems to sustain the view that an attempt by the passenger to alight from a railway train while it is passing a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time to permit him to leave it, will not, as a matter of law, be considered a negligent act unless the attending circumstances so clearly show that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that the question whether the act of the passenger in so attempting to alight from the train was negligent, that is, whether he exercised for his safety that degree of care and caution which a person of ordinary prudence would be expected under like circumstances to exercise, must ordinarily be submitted to the jury.⁹ While it is true that the attending

8. For a similar case see *Loyd v. The Railroad*, 53 Mo. 509; and see, also, *Ill. Cent. R. v. Able*, 59 Ill. 131; *Raben v. Railway Co.*, 74 Iowa, 732; *Railway Co. v. Coons*, 25 Ky. Law Rep. 509, 76 S. W. Rep. 45.

9. *Louisville, etc. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. Rep. 31, 12 Am. St. Rep. 443; *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. Rep. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687; *Railroad Co. v. Bean*, 9 Ind. App. 240, 36 N. E.

circumstances may so clearly indicate that the passenger, in attempting to alight from a moving railway train, acted imprudently or rashly that the court would be justified in declaring as a matter of law that his conduct was such as to bar

Rep. 443; *Railway Co. v. Gray*, 28 Ind. App. 588, 64 N. E. Rep. 39; *Harris v. The Railway*, 32 Ind. App. 600, 70 N. E. Rep. 407; *Newcomb v. The Railroad*, 182 Mo. 687, 81 S. W. Rep. 1069; *Weber v. The Railway*, 100 Mo. 194, *Fulks v. The Railway*, 111 Mo. 335, 19 S. W. Rep. 818; *Gress v. The Railway*, 109 Mo. App. 716, 84 S. W. Rep. 122; *Owens v. The Railway*, 84 Mo. App. 143; *Sanderson v. The Railway*, 64 Mo. App. 655; *Railway Co. v. Mayes*, 58 Ark. 397, 24 S. W. Rep. 1076; *Little Rock, etc., R'y Co. v. Atkins*, 46 Ark. 423; *St. Louis, etc. R'y Co. v. Cantrell*, 37 Ark. 526; *St. Louis, etc., R'y Co. v. Rosenberry*, 45 Ark. 256; *Missouri, etc., R. Co. v. Stringfellow*, 44 Ark. 322; *St. Louis, etc. R'y Co. v. Person*, 49 Ark. 184; *Central, etc. R. Co. v. Miles*, 88 Ala. 256; *Carr v. The Railroad*, 98 Cal. 366, 33 Pac. Rep. 213, 21 L. R. A. 354; *Railroad Co. v. Byrum*, 153 Ill. 131, 38 N. E. Rep. 578; *Simmons v. The Railway*, 120 Ga. 255, 47 S. E. Rep. 570; *Railway Co. v. McKinney*, 118 Ga. 535, 45 S. E. Rep. 430; *Coursey v. The Railway*, 113 Ga. 297, 38 S. E. Rep. 866; *Suber v. The Railway*, 96 Ga. 42, 23 S. E. Rep. 387; *Taylor v. The Railroad*, 71 N. Y. Supp. 884, 63 App. Div. 586; *Railroad Co. v. Winfrey*, — Neb. —, 93 N. W. Rep. 526; *Railroad Co. v. Hyatt*, 48 Neb. 161, 67 N. W. Rep. 8; *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. Rep. 976; *Railroad Co. v. Hughes*, 55 Kan. 491, 40 Pac. Rep. 919; *Railroad Co. v. Eakin's Adm'r*, 103 Ky. 465, 45 S. W. Rep. 529; s. c. 46 S. W. Rep. 496; s. c. 47 S. W. Rep. 872; *Railroad Co. v. Whittaker*, 22 Ky. Law Rep. 395, 57 S. W. Rep. 465; *Mills v. The Railway*, 94 Tex. 242, 59 S. W. Rep. 874, 55 L. R. A. 497; *Railway Co. v. Ratley*, — Tex. Civ. App. —, 87 S. W. Rep. 407; *Railway Co. v. Massey*, (Tex. Civ. App.) 76 S. W. Rep. 585; *Railway Co. v. Crockett*, 27 Tex. Civ. App. 463, 66 S. W. Rep. 114; *Railway Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758; *Railway Co. v. Meyers*, (Tex. Civ. App.) 35 S. W. Rep. 421; *Railroad Co. v. Coulburn*, 69 Md. 361, 16 Atl. Rep. 208; *Keith v. The Railway*, 5 Ont. L. R. 116, 2 Canadian R'y C. 26; *Kansas City, etc. R. Co. v. Matthews*, — Ala. —, 39 So. Rep. 207; *King v. Railroad Co.*, — Miss. —, 39 So. Rep. 810; *Southern R'y Co. v. Clariday*, — Ga. —, 53 S. E. Rep. 461.

The weight of authority is against the proposition that it is always, as a matter of law, negligence for a person to attempt to alight from a car while it is in motion. Where the circumstances are such that reasonable minds may fairly entertain different views as to the nature and character of the act, it is error for the court to pronounce as a matter of law that the act was negligent. *United Ry's Co. v.*

him from the right to a recovery for an injury thereby occasioned, still the inquiry in all such cases is whether the passenger acted as a person of ordinary prudence would have acted if placed in a like situation. And even though no invitation or direction be given the passenger to alight by an agent or servant, or no situation created tending to interfere to some extent with his free agency, circumstances for which the carrier is responsible may exist, inducing the passenger to attempt to alight from the train while it is slowly passing the depot platform, under which it would seem unjust to say that no person of ordinary prudence would have made the attempt, and that in thus attempting to leave the train the passenger was guilty of contributory negligence as a matter of law. Unless, therefore, the conduct of the passenger in attempting to alight from the train whilst in motion was so clearly imprudent or rash that there could be no reasonable difference of opinion in regard to it, the question of his contributory negligence should be determined by the jury upon a consideration of the circumstances attending the act, such as the rate of speed at which the train was running, the circumstances which induced him to alight, his age and vigor, the character of the place where the attempt was made, the facilities which were at hand tending to make the act easy or difficult to accomplish, whether he was incumbered with parcels or was otherwise hampered, whether it was light or dark, and any other circumstances tending to show whether he acted as a person of ordinary prudence and caution would have acted under the circumstances.

Weir, ——— Md. ———, 62 Atl. Rep. 588, citing *Western, etc. R. Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323, 14 L. R. A. 75. ——— ly moving, or moving very slowly opposite the depot platform and the person is physically active and his freedom of motion is un-

Where the person is invited or directed to alight, or where the act is done under the apprehension of impending peril, or where the circumstances are peculiarly favorable, as where the car is bare-ly moving, or moving very slowly opposite the depot platform and the person is physically active and his freedom of motion is unimpeded, the question of his negligence in alighting from the train whilst in motion may properly be submitted to the jury. *Butler v. The Railroad*, 59 Minn. 135, 60 N. W. Rep. 1090.

Sec. 1180. Same subject—How when danger obvious.—But although the passenger, by the refusal of the railway company to stop its train, may be carried beyond his destination unless he alights while the train is in motion, he will not be justified in attempting to alight, notwithstanding an invitation to do so by an employe acting in the line of his duty, if the speed of the train is so great that the danger of alighting is obvious and apparent, or if other circumstances exist making the attempt obviously perilous.¹⁰ In such cases, prudence would require him to submit to the wrong, and to seek his redress for it

10. *Lindsey v. The Railway*, 64 Iowa, 407; *Vimont v. The Railway*, 71 Iowa, 58; *Bardwell v. The Railroad*, 63 Miss. 574; *South, etc. R. Co. v. Schaufier*, 75 Ala. 136; *Rothstein v. The Railroad*, 171 Penn. St. 620, 33 Atl. Rep. 379; *Railroad Co. v. Hughes*, 55 Kan. 491, 40 Pac. Rep. 919; *Railroad Co. v. Collier*, 104 Tenn. 189, 54 S. W. Rep. 980; *Simmons v. The Railway*, 120 Ga. 225, 47 S. E. Rep. 570; *Lindsay v. The Railway*, 114 Ga. 896, 41 S. E. Rep. 46; *Sanders v. The Railway*, 107 Ga. 132, 32 S. E. Rep. 840; *Jones v. The Railway*, 103 Ga. 570, 29 S. E. Rep. 927; *Railroad Co. v. Dickinson*, 89 Ga. 455, 15 S. E. Rep. 534; *Railroad Co. v. Souders*, 178 Ill. 585, 53 N. E. Rep. 408; *Railroad Co. v. Hanberry*, 23 Ky. Law Rep. 1867, 66 S. W. Rep. 417; *Railroad Co. v. Gregston*, 12 Ky. Law Rep. 604; *Eaton v. The Railroad*, 67 N. H. 442, 40 Atl. Rep. 112; *Railroad v. Martelle*, 65 Neb. 540, 91 N. W. Rep. 364; *La Pointe v. The Railroad*, 182 Mass. 227, 65 N. E. Rep. 44; *s. c.* 179 Mass. 535, 61 N. E. Rep. 142; *Agulino v. The Railroad*, 21 R. I. 263, 43 Atl. Rep. 63; *Railway Co. v. Highnote* — Tex. —, 86 S. W. Rep. 923, *reversing* (Tex. Civ. App.) 84 S. W. Rep. 365; *Mercher v. The Railroad*, — Tex. Civ. App. —, 85 S. W. Rep. 468; *Gulf, etc. R'y Co. v. Cleveland*, 2 Tex. Ct. Rep. 253, (Tex. Civ. App.) 61 S. W. Rep. 951; *High v. The Railroad*, (Tex. Civ. App.), 55 S. W. Rep. 526; *Pennsylvania Co. v. Hixon*, 10 Ind. App. 520, 38 N. E. Rep. 56; *Bosworth v. Walker*, 83 Fed. 58, 27 C. C. A. 402; *Whitlock v. Comer*, 57 Fed. 565; *Peak's Adm'r v. The Railroad*, 23 Ky. Law Rep. 2157, 66 S. W. Rep. 995, *Gress v. The Railway*, 109 Mo. App. 716, 84 S. W. Rep. 122; *Railroad v. Trail*, (Miss.) 25 So. Rep. 863; *Morrow v. The Railway*, 134 N. Car. 92, 46 S. E. Rep. 12; *Dunning v. Railroad Co.*, — Ind. App. —, 77 N. E. Rep. 1049.

See *post*, § 1224; *ante*, § 1067.

The question whether a passenger who has received an injury while attempting to alight from a train whilst in motion was familiar with the particular place where he alighted, and whether his familiarity with it was such as to make him aware of its dangerous character, may be considered by the jury in determining . . .

in an action against the carrier, if he should be blamable. A passenger would only be justified in the attempt to avoid such an inconvenience by leaving the vehicle while in motion, when the circumstances were such as to induce a person of ordinary prudence and caution to believe that no danger was to be apprehended from such a course, or when he had reasonable ground for believing that he was in peril; and that it was necessary for his safety.¹¹

whether the act was negligent. *Sanders v. The Railway*, 107 Ga. 132, 32 S. E. Rep. 840.

However negligent the railway company may have been in failing to announce the name of the station, or in failing to stop the train, or in failing to afford the passenger a reasonable opportunity to alight, such conduct will not be considered the proximate cause of an injury suffered by the passenger while voluntarily undertaking to alight from the train at a place which was obviously dangerous. *Simmons v. The Railway*, 120 Ga. 225, 47 S. E. Rep. 570.

To jump from a moving car on a dark night at a place where the ground is covered with snow and ice will be such contributory negligence on the part of the passenger as will preclude him from the right to a recovery for an injury thereby suffered. *Geogagn v. The Railroad*, 42 N. Y. Supp. 205, 10 App. Div. 454.

It will be contributory negligence for a female passenger in an enfeebled condition to attempt to alight from a railway car while it is in motion, when she is not aware how fast the car is going. *Railroad Co. v. Lee*, 97 Ala. 325, 12 So. Rep. 48. So it

will be contributory negligence for a female passenger who is incumbered with bundles to attempt to alight from a moving train. *Toledo, etc. R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. Rep. 274.

Where a female passenger, weighing 200 pounds, was injured while attempting to alight from a train which was moving at the rate of from five to six miles an hour, it was held that her conduct was such as to preclude her from the right to a recovery. *Hecker v. The Railway*, 110 Mo. App. 162, 84 S. W. Rep. 126. And where a passenger was injured while attempting to alight from a moving train, it was held that the fact that two men alighted just before him, and that in so doing they were thrown to the ground in full view of the passenger, was sufficient to charge him with contributory negligence without further proof. *Brown v. Barnes*, 151 Penn. St. 562, 25 Atl. Rep. 144.

11. *The Evansville, etc. R. R. v. Duncan*, 28 Ind. 441; *Morrison v. The Railway*, 56 N. Y. 302; *Burrows v. The Railway*, 63 *id.* 556; *Gavett v. The Railroad*, 16 Gray, 501; *Lucas v. The Railroad*, 6 *id.* 64; *Penn. R. R. v. Zebe*, 33 Penn. St. 318; *Ohio, etc. R. R. v. Schiebe*,

Sec. 1181. (§ 641.) Getting on train while in motion.—The same difference of opinion exists on the question whether it is *per se* a negligent act on the part of the passenger to attempt to board a railway train whilst in motion as is found in those cases where injuries have been sustained while attempting to alight from the train under similar circumstances, there really being, it is said, no such difference between the acts as would justify the application of different rules.¹² It is held by a number of courts that any attempt by the passenger to get upon a railway train while it is in motion, unless he is induced to make the attempt by some act or conduct on the part of the employees of the railway company which naturally tends to divert his attention from the danger, or unless he is invited or directed to board it by an agent or servant acting in the line of his duty, is a negligent act *per se* and precludes the passenger from the right to a recovery for the injury which may be thereby occasioned, and that the fact that considerations of personal convenience may have induced him to make the attempt will furnish no excuse for such conduct.¹³ Thus it is held that the refusal of the employees of the railway company to

44 Ill. 460; Keokuk Packet Co. v. Henry, 50 *id.* 460; Pennsylvania R. R. v. Aspell, 23 Penn. St. 147; Davis v. The Railway, 18 Wis. 175; Lambeth v. The Railroad, 66 N. C. 494; Damont v. The Railroad, 9 La. Ann. 441; Ill. Cen. R. R. v. Able, 59 Ill. 131; Railway Co. v. Mitchell, 98 Tenn. 27, 40 S. W. Rep. 72, citing Hutchinson on Carr. Cousins v. The Railway, 96 Mich. 386, 56 N. W. Rep. 14.

12. See Creech v. The Railway, 66 S. Car. 528, 45 S. E. Rep. 86.

13. Phillips v. The Railroad, 49 N. Y. 177; Harvey v. The Railroad, 116 Mass. 269; Owen v. The Railroad, 2 Bosw. 374; Ginnon v. The Railroad, 3 Rob. (N. Y.) 25; Mettlestadt v. The Railroad, 4 *id.* 377; Ohio, etc. R'y v. Stratton, 78 Ill. 88; Ill. Cen. R. R. v. Chambers, 71 *id.* 519; Ill. Cen. R. R. v. Slatton, 54 *id.* 133; Johnson v. The Railroad, 70 Penn. St. 357; Knight v. The Railroad, 23 La. Ann. 462; Hubener v. The Railroad, *id.* 492; Lewis v. The Railroad, 38 Md. 588; Texas, etc. R'y v. Murphy, 46 Texas. 356; Mich. Cen. R. R. v. Coleman, 28 Mich.

If by the wrongful act of the railway company the passenger is placed in a position where under sudden impulse to save himself from serious inconvenience he attempts to alight from the train while in motion, his act will not be considered as negligent if a person of ordinary prudence would have made the attempt.

stop the train, or a custom on their part to slacken its speed to take on passengers without coming to a stop, will not excuse the conduct of the passenger in attempting to board it. And if the train should fail to stop to receive passengers when by law or its published schedules it ought to do so, the passenger, it is said, would have his remedy by an action for the damage or loss sustained, and the failure of the train to stop would furnish him with no excuse for attempting to board it. So it is held that if the railway company adopts a practice of receiving its passengers while the train is in motion, it would be reckless conduct on the part of the company which would not excuse the equally reckless conduct of the passenger in attempting to board it while in motion. But the passenger may be justified in attempting to board a railway train whilst in motion if he is induced to do so by some act or direction of an agent or servant of the railway company which naturally tends to divert his attention from the danger.¹⁴ Thus it is held that if the servants of

441; *Timmons v. The Railroad*, 6 Ohio St. 105; *Reddington v. Trac-tion Co.*, 132 Penn. St. 154; *Den-ver, etc. R. Co. v. Pickard*, 8 Colo. 163; *Swigert v. Railroad Co.*, 75 Mo. 475; *Missouri Pac. R'y Co. v. Railroad Co.*, 36 Fed. Rep. 879; *Missouri Pacific R'y Co. v. Rail-way Co.*, 34 Fed. Rep. 92; *Bacon v. Railroad Co.*, 143 Penn. St. 14, 21 Atl. Rep. 1002; *Tobin v. The Railroad*, 211 Penn. St. 457, 60 Atl. Rep. 999; *Chaffee v. The Railroad*, 17 R. I. 658, 24 Atl. Rep. 141; *Railroad Co. v. Picklesimer*, 89 Va. 389, 16 S. E. Rep. 245; *Morrow v. The Railway*, 134 N. Car. 92, 46 S. E. Rep. 12, citing *Hutchin-son on Carr.*; *Bailey v. The Rail-way*, 14 Ky. Law Rep. 226, 20 S. W. Rep. 198; *Meeks v. The Railroad*, 122 Ga. 266, 50 S. E. Rep. 99; *Ricks v. The Railway*,

118 Ga. 259, 45 S. E. Rep. 268; *Walthers v. The Railway*, 72 Ill. App. 354; *Myers v. The Railroad*, 82 Hun, 36, 31 N. Y. Supp. 153.

14. *Chicago, etc. R. Co. v. Gore*, 202 Ill. 188, 66 N. E. Rep. 1063, 95 Am. St. Rep. 224; *s. c.* 105 Ill. App. 16; *s. c.* 96 Ill. App. 553; *s. c.* 92 Ill. App. 418; *Pence v. The Railroad*, 116 Iowa, 279, 90 N. W. Rep. 59; *Railroad Co. v. Glover*, 24 Ky. Law Rep. 1447, 71 S. W. Rep. 630; *Murphy v. The Railroad*, 43 Mo. App. 342.

It is not within the real or ap-parent scope of the authority of a station agent to direct a person to board a moving train. *Rail-way Co. v. Koehler*, 47 Ill. App. 147.

Whether it was negligence, where the conductor told the pas-senger to jump on, is a question

the railway company, without giving due notice to the passenger, put the train upon which he is being carried in motion, or if they fail to wait for him when it is their duty to do so, and he is thereby placed in the dilemma of being left behind or of getting on while the train is in motion, he will be so far justified in making the attempt, if it can be done without apparent danger, that he will not be precluded from the right to a recovery if he is thereby injured. So where a passenger had tickets entitling him to passage over two lines of road which were running in connection with each other, and upon his arrival at the terminus of the first road, the train of the second, upon which he was to pursue his journey, moved off without giving him time to cross the platform in order to reach it, it was held that it was not contributory negligence in him to make the effort to get aboard while the train was moving slowly off, and that, having fallen in the attempt and received an injury, the company was liable because it had not given him a sufficient time to reach its train after his arrival, as it was its duty to do.¹⁵

Sec. 1182. Same subject—View that attempt by passenger to board train while in motion is not necessarily a negligent act per se.—But, on the other hand, it is held that an attempt by the passenger to board a railway train while it is passing a place at which it should stop to enable him to board it, or at which it has failed to stop a reasonable time for him to get

of fact under all of the circumstances. *Kansas, etc. R'y Co. v. Dorough*, 72 Tex. 108, following *Texas, etc. R. Co. v. Murphy*, 46 Tex. 356. See, also, *Texas, etc. R'y Co. v. Davidson*, 68 Tex. 370; *Distler v. The Railroad*, 151 N. Y. 424, 45 N. E. Rep. 937, 35 L. R. A. 762, reversing 28 N. Y. Supp. 865, 78 Hun, 252.

But to attempt to board a moving train on a cold and snowy night, when the passenger is stiff and cold and incumbered with

baggage, is negligence, even though the train did not stop long enough to permit him to get on. *McMurtry v. Railway Co.* 67 Miss. 601. To same effect: *Richmond, etc. R. Co. v. Pickleseimer*, 85 Va. 798. That the train does not stop as it should, or that the conductor says "jump on," will not excuse when the train is going four to six miles an hour. *Hunter v. Railroad Co.*, 112 N. Y. 371.

15. *Johnson v. The Railroad*, 70 Penn. St. 357.

on, will not, as a matter of law, be considered a negligent act unless the attending circumstances so clearly indicate that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that, in the absence of circumstances leading to such a conclusion, the question whether the act was negligent should ordinarily be left to the jury;¹⁶

16. *Creech v. The Railway*, 66 S. Car. 528, 45 S. E. Rep. 86; *Mills v. The Railway*, 94 Tex. 242, 59 S. W. Rep. 874, 55 L. R. A. 497; *Railroad Co. v. Stewart*, 14 Tex. Civ. App. 703, 37 S. W. Rep. 770; *Schaefer v. The The Railway*, 128 Mo. 64, 30 S. W. Rep. 331; *Fulks v. The Railway*, 111 Mo. 335, 19 S. W. Rep. 818; *Heaton v. The Railroad*, 65 Mo. App. 479; *Wooten v. The Railroad*, 79 Miss. 26, 29 So. Rep. 61; *Railway Co. v. McKinney*, 118 Ga. 535, 45 S. E. Rep. 430; *Mahar v. The Railroad*, 39 N. Y. Supp. 63, 5 App. Div. 22; *Frobisher v. Transportation Co.*, 81 Hun, 544, 30 N. Y. Supp. 1099; *Railroad Co. v. Flaharty*, 96 Ill. App. 563; s. c. 105 Ill. App. 14.

It is not contributory negligence as a matter of law for a strong, able bodied man to attempt to board a railway train running four miles an hour where he had not been afforded a reasonable opportunity to board it while at rest. *Atchison, etc. R'y Co. v. Holloway*, — Kan. —, 80 Pac. Rep. 31.

Where, however, the passenger is warned by the carrier's servants not to attempt to board the train while in motion, and in spite of the warning he attempts to board it and is injured, he cannot recover. *Fulks v. The Railway*, 111 Mo. 335, 19 S. W. Rep. 818. So if the passenger attempt to board

the train while it is moving two miles an hour, although told to do so by the conductor, he cannot recover if he is thereby injured. *Myers v. The Railroad*, 88 Hun, 619, 34 N. Y. Supp. 807; s. c. 82 Hun, 36, 31 N. Y. Supp. 153. Where the train is running four or five miles an hour, it will be negligence in the passenger to voluntarily attempt to board it. *McLaren v. The Railway*, 100 Ala. 506, 14 So. Rep. 405.

A city ordinance providing for the punishment of any person who gets off or on a railway train while it is in motion, without permission to do so from the person in charge, *held*, not to be within the police power of the city and therefore unreasonable and void. *Wice v. The Railway*, 193 Ill. 351, 61 N. E. Rep. 1084, 56 L. R. A. 268, *reversing* s. c. 93 Ill. App. 266. So where a city ordinance provided that any person, not in the employ of a railroad company, who should jump on or off a train while in motion should be subject to a fine, it was held that as to persons intending to become passengers on the company's trains, the ordinance was unreasonable and against common right as an attempt to regulate the rights of passenger and carrier. *Mills v. The Railway*, 94 Tex. 242, 57 S. W. Rep. 291, 55 L. R. A. 497. But where a statute forbid any person to get upon a moving

and this view, it is believed, is supported by the weight of modern authority. Where, therefore, the passenger has received an injury while attempting to board a railway train whilst in motion, the circumstances attending the act, such as the rate of speed at which the train was running, the age and vigor of the passenger, the inducement that was given him to board the train, the character of the place where the attempt was made, whether he was incumbered with parcels or the like, and any other circumstances tending to show whether he acted prudently or imprudently must be looked to in determining whether he acted as a person of reasonable prudence would have acted under like circumstances, and the question is ordinarily one for the jury to decide under appropriate instructions from the court.

Sec. 1183. Same subject—Negligence of passenger in boarding train while in motion no excuse for pushing him from platform.—But although it may be incautious or imprudent conduct on the part of the passenger to attempt to board a railroad train whilst in motion, such conduct can never justify the acts of the railroad company's servants in pulling or pushing him from the platform of the car after he has once succeeded in getting safely upon it.¹⁷ His negligence in boarding the train whilst in motion cannot be construed as contributing in any manner to an injury suffered from having been pushed or pulled from the platform of the car by the company's servants, since, after he is once upon it, he is entitled to

train unless in compliance with law or by permission under the company's rules, it was held that a person who had sustained injury while attempting to board a moving train could not recover unless he could show that he was acting in compliance with law, or by permission under the company's rules. *Young v. The Railway*, 100 Iowa, 357, 69 N. W. Rep. 682.

17. *Sharer v. Paxon, et al.*, 171 Penn. St. 26, 33 Atl. Rep. 120;

Pennsylvania Co. v. Reed, 60 Fed. 694, 9 C. C. A. 219, 20 U. S. App. 400.

While it might be eminently proper for the railroad company's servants to seize hold of a passenger in order to prevent him from boarding a moving train, it would be gross negligence for them to take hold of him after he had safely gotten upon the car steps, and thus passed the most serious danger, and pull him from

all the rights and protection due a passenger who has boarded the train in the customary manner.

Sec. 1184. (§ 646.) Leaving or entering train elsewhere than on platform where one is provided.—If the railway company has provided a suitable platform on one side of its track for the convenience and safety of its passengers in alighting from its trains, the passenger will be chargeable with negligence if, without a necessity for so doing, he leaves the train on the opposite side where no such provision has been made; and if injury should result to him while so leaving the train, it would be attributed to his own imprudence in failing to avail himself of the means provided.¹⁸ Thus where a railway company had provided a suitable platform on one side of its track, and a passenger was injured while leaving a train on the side opposite the platform by being struck by an engine which was passing on an adjoining side track, it was held that, although it might have been incautious on the part of the railway company to run the engine by the train at such a time, the passenger was precluded from a recovery by his own conduct in failing to avail himself of the means provided for passengers to alight, and that the fact that passengers had been accustomed to leave the company's trains on that side was no excuse.¹⁹ Where, however, the railway company has provided platforms on both sides of its track, and one of such platforms is unsafe and not intended for the use of passengers, a passenger who has no notice of its

the steps. *Harrold v. The Railroad*, 47 Minn. 17, 49 N. W. Rep. 389.

18. *Pastoris v. The Railroad*, 149 Penn. St. 432, 24 Atl. Rep. 283; *Railroad Co. v. Ricketts*, 96 Ky. 44, 27 S. W. Rep. 860; *Flanagan v. The Railroad*, 181 Penn. St. 237, 37 Atl. Rep. 341; *Drake v. The Railroad*, (Penn.), 20 Atl. Rep. 994.

Where the body of a passenger was found under the wheels of the

train on the side opposite the platform, and it is shown that he was familiar with the station premises, a judgment in favor of the railroad company is justifiable where no evidence is offered showing how the passenger came to be where he was. *Leary v. The Railroad*, 173 Mass. 373, 53 N. E. Rep. 817.

19. *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318; *s. c.* 37 Penn. St. 420.

unsafe condition will not be negligent in using it to alight from the train. Under such circumstances, it would be the duty of those in charge of the train to use all reasonable means to warn him against the danger, and for a failure so to do, whereby he suffered injury, the railway company would be liable.²⁰

So likewise, if the passenger, without a necessity for so doing, attempts to get upon the train without availing himself of the facilities provided for enabling passengers to board it, he will do so at his own risk, and the railway company cannot be held responsible for an injury he may receive while so attempting to board the train.²¹ Where, however, the passenger is rushed from the depot platform and across the company's tracks by a crowd of impatient passengers, and he is injured in attempting to board a train from the opposite side where no facilities for such purpose are provided, he is not, as a matter of law, chargeable with negligence, and the question of his conduct should properly be submitted to the jury.²² So it is held that where the danger in getting on or off the train upon the side opposite the depot platform is not obvious, and there is no warning given the passenger of any danger, it may become a question for the jury to determine whether under the

20. *Railroad Co. v. Davidson*, 76 Fed. 518, 22 C. C. A. 306, 46 U. S. App. 300; s. c. 64 Fed. 301, 12 C. C. A. 118, 24 U. S. App. 354.

21. *Michigan Cent. R. R. v. Coleman*, 28 Mich. 440; *Railway Co. v. Wade*, 18 Ind. App. 346, 48 N. E. Rep. 12; *Phillips v. The Railroad*, 62 Hun, 233, 16 N. Y. Supp. 909.

The duty devolves upon a person, who would take passage by cars, to use his natural faculties in selecting such means and places of access to the cars as promise immunity from danger. Not to do so is evidence of negligence. Thus where a passenger, who was boarding a train, climbed upon it from between the cars on the side op-

posite the station platform, and in so doing caught his foot in the bumpers and injured it, it was held that his negligence in boarding the train barred a recovery. *Wardlaw v. The Railway*, (Cal.) 42 Pac. Rep. 1075.

A passenger who, while waiting for a train, voluntarily leaves the depot platform and stands between two tracks in a position of manifest danger from passing trains, cannot recover for an injury received from being struck by the train he is waiting to take. *McGeehan v. The Railroad*, 149 Penn. St. 188, 24 Atl. Rep. 205.

22. *Begley v. The Railroad*, 201 Penn. St. 84, 50 Atl. Rep. 1009.

circumstances it was negligent in the passenger to attempt it.²³ And where such danger really exists, it may be negligence in the carrier not to give notice of it or to take measures to prevent the passenger from getting off there and thus exposing himself to the danger.²⁴

Sec. 1185. (§ 647.) Same subject—Effect of carrier's acquiescence or directions.—But where the railway company has established the practice of putting off passengers on the side of the train opposite the depot platform, or where passengers are in the habit of leaving the train at a certain station on the side where no facilities for alighting are provided, with the knowledge and acquiescence of those in charge of the train, it will not be such contributory negligence for the passenger to alight from the train on the side opposite the platform as will preclude him from the right to a recovery if he sustains injury through the company's negligence while so alighting. Thus where passengers residing in a certain part of a village were in the habit of leaving the train on the side opposite to the platform, with the knowledge of the conductor, and without objection on his part, it was held that such a passenger, in attempting to get off on that side, was not guilty of such contributory negligence as to prevent her from recovering from the company for an injury which she had sustained by the sudden starting of the train while she was descending from the cars, without any signal or notice, and without any examination by those in charge of the train to ascertain whether any one was getting off on that side.²⁵ So the passenger will not be chargeable with contributory negligence in alighting from the train on the side opposite the depot platform where he is directed to do so by the conductor, and no danger is obvious;²⁶ nor will

23. See to this effect, *McQuilken v. Railroad Co.*, 64 Cal. 463, distinguishing, if not disapproving, *Pennsylvania R. Co. v. Zebe*, *supra*.

24. *McKimble v. The Railroad*, 139 Mass. 542. The company was

held liable in such a case in *Van Ostran v. Railroad Co.*, 35 Hun, 590, *affirmed* in 104 N. Y. 683.

25. *Keating v. The Railroad*, 49 N. Y. 673.

26. Where the conductor of the train places the step for passen-

he be negligent in so alighting when it is dark, and he is without knowledge as to which side of the train the platform is on, and passengers are leaving on both sides with the assistance of the company's servants.²⁷

But it is held that, while it may be customary for the carrier to discharge passengers at a certain place where no facilities for the purpose are provided, if the passenger had no knowledge of the custom, he cannot, in an action against the company, be permitted to avail himself of such custom.²⁸

Sec. 1186. (§ 647a.) Leaving or entering train at place where no platform is provided.—If the passenger voluntarily, and without a necessity for so doing, attempts to alight from the train at a place not intended for passengers to alight, and where no facilities for the purpose are provided, he will be chargeable with such negligence as will defeat a recovery for an injury thereby received.²⁹ But if the railway company has established a practice of discharging passengers at a place other than at the depot platform, as where it is customary for it to put off passengers at a point on a side track, or at a railway crossing, a passenger will not be chargeable with negligence if he attempts to alight from the train at such place in the customary manner; and for any injury received by him while so alighting, whether it be occasioned by the negligent

gers to alight on the wrong side of the train, a passenger who alights on that side will not, in so doing, be negligent. *Lustig v. The Railroad*, 65 Hun, 547, 20 N. Y. Supp. 477.

A passenger, who alights from the train on the side opposite to the depot platform, is not as a matter of law chargeable with negligence since he may have been directed to so alight by the conductor. *Owen v. The Railway*, 29 Wash. 207, 69 Pac. Rep. 757.

27. *Railway Co. v. Harris*, 103 Va. 635, 49 S. E. Rep. 997.

28. *Margo v. Railroad Co.*, — Penn. St. —, 62 Atl. Rep. 1079.

29. *Margo v. Railroad Co.*, — Penn. St. —, 62 Atl. Rep. 1079.

A passenger who voluntarily leaves a train in the night time while it is standing on a bridge, without any inducement to do so by the servants in charge of the train, will be chargeable with such negligence as will defeat a recovery for an injury received by his stepping from the train and falling to the ground below. *Blevins v. The Railroad*, 3 Okl. 512, 41 Pac. Rep. 92.

starting of the train, or by the unsafe condition of the landing place, the company will be responsible.³⁰ So the passenger will not be negligent in attempting to alight at a place away from the depot platform when he is directed to do so by a

30. *Girton v. The Railroad*, 199 Penn. St. 147, 48 Atl. Rep. 970; *Pennsylvania Co. v. McCaffery*, 173 Ill. 169, 50 N. E. Rep. 713, *affirming* 68 Ill. App. 635; *Railroad Co. v. Johnson*, 44 Ill. App. 56.

It will be negligence for a railroad company to discharge its passengers at a place where they are liable to be injured by trains belonging to another company. *Railroad Co. v. Schmelling*, 197 Ill. 619, 64 N. E. Rep. 714.

It will be competent for a passenger to show a custom, acquiesced in by the railroad company, for passengers to alight from the train on the side where there is a parallel track rather than on the side where there is no track; and when such custom is established, it will not be contributory negligence on the part of the passenger if he fail, while so alighting from the train, to stop, look and listen before crossing the track. *Pennsylvania Co. v. McCaffrey*, *supra*.

If a freight train has reached a point where the passenger may lawfully leave it, and no direction is given him to alight on the side where there is no danger, but he is permitted to alight on the side where there is danger, it is a question for the jury whether reasonable care for the safety of the passenger has been exercised. *Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. Rep. 901.

A mere showing, however, that

at some time, or at different times, passengers had taken advantage of the stop of the train at a crossing to leave the train, without the directions of the company's servants, will not be sufficient to excuse the conduct of a passenger who alights at such place. *Railroad Co. v. Johnson*, *supra*. Nor will a custom, known to the company, of permitting passengers to leave the train at a crossing of railway tracks, where by statute the train is required to stop, excuse the conduct of a passenger in alighting at a place of such obvious danger. *Mercher v. The Railroad*, — Tex. Civ. App. —, 85 S. W. Rep. 468.

In *Morgan v. Railroad Co.* (Penn.), 16 Atl. Rep. 353, a passenger got off at a crossing at which passengers were usually received and discharged but at which there was no platform. Instead of getting out on the usual side away from other tracks, he got out on the other side because it seemed to him a better alighting place, and was struck by a passing train which he could have seen if he had looked. *Held*, that the company was not liable.

A female passenger who was old and infirm was required to disembark at her destination at a place where no platform was provided. The track was fenced on both sides, the only exit being by way of a stile. In attempting to leave the track she fell upon a

servant of the company acting in the line of his duty, and the place where the attempt is made is not obviously dangerous.³¹

If the railway company has established a custom of receiving passengers on the train at a place other than the regular depot platform, a passenger, or one intending to become such, will not be chargeable with negligence if he attempts to board the train at such customary place of receiving passengers, and the company will be responsible to him for any injury thereby received. Thus, if it has become customary for passengers to get on board the train at a place where it stops for wood and water, with the knowledge and acquiescence of the conductor and other employees of the road, it will be negligence in the company to leave the ground adjacent to such customary place of receiving passengers, and over which they must necessarily pass, in a dangerous condition; and if a passenger, or one who intends to become such, assuming, as he would have the right to do, that such grounds are in a safe condition, should, in the night-time, receive injury from falling into a pit immediately adjacent to such customary place he could not be charged with contributory negligence in attempting to get upon the train there instead of at the place appointed for that purpose by the company, and the company would be liable to him for the injury sustained.³² So it is not negligence for the passenger to attempt to board the train away from the regular platform

cattle guard and was injured. *Held*, that her failure to have some one there to meet her did not as a matter of law constitute negligence. *Texas, etc. R'y Co. v. Reid*, 7 Tex. Ct. Rep. 607, 74 S. W. Rep. 99.

31. *Central, etc. R. Co. v. Thompson*, 76 Ga. 770; *Depp v. The Railroad*, 12 Ky. Law Rep. 366, 14 S. W. Rep. 363.

32. *Hulbert v. The Railroad*, 40 N. Y. 145. See, also, *San Antonio, etc. R'y Co. v. Turney*, (Tex. Civ. App.) 78 S. W. Rep. 256.

But evidence that some people have boarded a train at a point away from the depot platform, without proof that they did so with the authority and consent of those in charge of the train, will be insufficient to support a finding that the railroad company had invited the public to board the train at such point. *Jones v. The Railroad*, 156 N. Y. 187, 50 N. E. Rep. 856, 41 L. R. A. 490, *reversing, s. c.* 35 N. Y. Supp. 1109, 90 Hun, 605; *s. c.* 61 N. Y. Supp. 721, 46 App. Div. 470.

where he is directed to do so by the company's servants acting in the line of their employment.³³

Sec. 1187. (§ 648.) Alighting at an unusual place when train has stopped short of or has overshot platform.—If a railway train has stopped short of or has overshot the platform designed for the alighting of passengers, and the passenger undertakes to descend from the carriage in which he is being carried at an unusual and inconvenient place, and in so doing receives an injury, it will be contributory negligence on his part if the train is intended to be brought up to the platform and he will not wait until this is done, unless there are circumstances, as there may be, which will excuse his alighting where he is.³⁴ It has been held, however, that if the name of the station has been called, and the passenger has good reason to believe that that is the place at which the company or its employees intend to have him leave the train, or if he is advised or encouraged to alight there by a brakeman or any other officer of the train in the line of his duty in seeing to the alighting of passengers, it will amount to an invitation to alight; and if he do so, using due care, and is injured, it will not be such contributory negligence as will excuse the company.³⁵ But where there was no invitation to alight, and no reasonable ground for

Whether a railroad company has, by a long-continued course of action, induced the public to believe that they are invited to board the company's trains at a place other than at the depot platform, is a question for the jury, and on its determination will hinge the question whether a passenger was chargeable with negligence in being at such place to board a train. *Railroad Co. v. Doan*, 195 Ill. 168, 62 N. E. Rep. 826, *affirming* 93 Ill. App. 247.

33. *Baltimore, etc. R. Co. v. Kane*, 69 Md. 11; *Missouri, etc. R'y Co. v. Watson*, 72 Tex. 631; *Irish v. The Railroad*, 4 Wash. 48,

29 Pac. Rep. 845, 31 Am. St. Rep. 899.

34. *Railway Co. v. Murray*, 113 Ga. 1021, 39 S. E. Rep. 427.

To voluntarily get off away from the platform too short for the train, when by passing through the car in front the passenger could get off on the platform, is negligence. *Eckerd v. Railway Co.*, 70 Iowa, 353.

35. *Foy v. The Railway*, 18 Com. B. (N. S.) 225; *The Columbus, etc. R'y v. Farrell*, 31 Ind. 408; *Filer v. The Railroad*, *supra*; *Robson v. The Railway*, L. R. 2 Q. B. Div. 85; *Foss v. Railroad Co.*, 66 N. H. 256; 21 Atl. Rep. 222;

believing that the train would not return to the customary place for alighting, it was held that the passenger had been guilty of contributory negligence in descending from the carriage at the place where it was stopped, and that she could not, therefore, recover.³⁶ But in *Rose v. The Railway*,³⁷ where

Georgia R. Co. v. Usry, 82 Ga. 54; *Talbot v. The Railway*, 72 Mo. App. 291, citing *Hutchinson on Carr.*

In *McDonald v. The Railroad*, 88 Iowa, 345, 55 N. W. Rep. 102, it appeared that the front end of the car in which the plaintiff was a passenger was drawn up to the depot platform, but that the rear end was not. It was dark and the plaintiff, in attempting to leave the car from the rear platform, fell and was injured. It was held that it was not contributory negligence for the passenger to attempt to leave the car by means of the rear platform instead of at the forward end, and that the company was guilty of negligence in so stopping the train at the depot platform without warning the passenger or taking proper precautions against his attempt to alight from the rear end of the car.

Where a train stops short of a depot platform, and passengers are alighting from the train with the assistance of the company's servants, a passenger will not be chargeable with negligence in attempting to leave the train. *Railway Co. v. Harris*, 103 Va. 635, 49 S. E. Rep. 997.

36. *Siner v. The Railway*, L. R. 3 Exch. 150. In *Nagle v. Railroad Co.*, 88 Cal. 86, 25 Pac. Rep. 1106, the train stopped before reaching the station, but the station was not called nor was anything done to invite passengers to alight. The

plaintiff, assuming the stop to be made at the station, jumped off in the dark without looking and was injured. Held, that the company was not liable.

37. L. R. 2 Exch. Div. 248.

In *Taber v. Railroad Co.*, 71 N. Y. 492, it is said: "The fact that the train overshot the station, rendering it necessary after it came to a standstill to start it back to the usual stopping place, in connection with the other circumstances, made it a question for the jury whether, in the exercise of reasonable care and prudence, the defendant should not have given notice to passengers desiring to alight at the station that the train had not come to a final stop and that it would back up."

In *Sherwood v. Railway Co.*, 82 Mich. 374, it appeared that when the train reached the station the name was called, and the train, though, in fact, having overshot by a short distance its intended stopping place, came to a full stop; that other passengers got off with the knowledge of the conductor, who assisted them; that every one, except the engineer and fireman, supposed the alighting place was reached, and that plaintiff attempted to alight, but that, just as she was stepping off, the train started suddenly backward without warning, throwing plaintiff to the ground and seriously injuring her. Said the court: "The

the train had overshot the platform, and the plaintiff, a passenger, after waiting some time for the train to be backed, which was not done, and seeing other passengers getting out, undertook to do so herself, and was injured by a fall in the attempt, Cockburn, C. J., although he thought there was evidence on which the case ought to have been submitted to a jury, was evidently of opinion that the plaintiff had not been guilty of such contributory negligence as should preclude her from a recovery. "Under these circumstances," said he, "what were the passengers to do? Can it be said that they were to sit still and be carried on to the next station, perhaps forty or fifty miles off, and then be liable to be called upon to pay the full fare for the whole distance, and to be exposed to various inconveniences—can that be seriously contended? If the passenger is satisfied that the train is going on, and there is apparently no alternative but to get out, he must do as best he can. Of course, if he is careless in getting out and is thereby injured, it is his own fault; but if he does his best and yet sustains injury, the company will not have done what it was incumbent on them to do, and will be liable. Here the company's men did nothing to obviate inconvenience and danger."

Sec. 1188. Using ways for leaving or entering vehicles not intended for that purpose.—Where the carrier has provided a reasonably safe way for passengers to leave or enter the ve-

defendant was bound to take notice, under the circumstances stated, that the passengers would attempt to alight, and, if the stop was of sufficient length of time to allow it, some of them would be in the act of alighting when the train started back. If, therefore, the stop was of such duration, it would be negligent in starting back without some warning. *Wood v. Railway Co.*, 49 Mich. 372; *Stone v. Railway Co.*, 66 *id.* 77."

In *Hemmingway v. Railroad Co.*, 72 Wis. 42, a boy eleven years of

age was a passenger on a freight train and paid his fare to the conductor. It was the custom to run that train slowly past the depot at the place of his destination but without stopping, and then to back up. The conductor did not inform the boy of this custom, and the boy seeing the train going past the station, and being told by a passenger that he would better get off, attempted to do so and was injured. The company was held liable.

hicle, it will be a negligent act on the part of the passenger, where no necessity therefor exists, to make use of another way not intended for that purpose. Thus where the railway company designates a certain door through which the passengers are directed to leave the car, a passenger who voluntarily attempts to leave the car through another door will be chargeable with negligence.¹ And if the passenger is temporarily prevented from availing himself of the usual way leading from the train to the depot because of a freight train occupying an intervening track, and he voluntarily attempts to reach the depot by passing around the freight train, his conduct will be such negligence as will defeat a recovery if he is thereby injured.² So it will be negligence for the passenger to voluntarily leave a boat by a gangway reserved for the discharge of freight,³ or for the use of the employees of the boat.⁴

And where a railway company has provided a suitable way for enabling passengers to enter the train, it will be negligence for the passenger to attempt to enter it by passing through the baggage car,⁵ or to get upon a freight car to go thence to the caboose,⁶ or to attempt to reach a car standing on a side track by using another way than the one provided.⁷

Sec. 1189. Same subject—Effect of carrier's acquiescence.

Where, however, it has been customary for passengers in leaving the vehicle to make use of another way than that provided, with the knowledge and acquiescence of the carrier's servants, it will not necessarily be such negligence for the passenger to leave the vehicle by the customary way as will bar a recovery if he is thereby injured. Thus, if a railway company permits passengers generally to leave a combination baggage and pas-

1. *Rattersee v. The Railway*, 81 S. W. Rep. 566. (Tex. Civ. App.), 81 S. W. Rep. 566.

2. *Railway Co. v. Cox*, 60 Ark. 106, 29 S. W. Rep. 38.

3. *Graham v. The Railroad*, 39 Fed. 596. See, also, *Reed v. Bridge Co.*, 16 Ky. Law Rep. 379, 28 S. W. Rep. 149.

4. *Dodge v. Steamboat Co.*, 148 Mass. 207.

5. *Union Pac. R'y Co. v. Sue*, 25 Neb. 772.

6. *Player v. The Railway Co.*, 62 Iowa, 723.

7. *Archer v. The Railroad*, 110 Mo. App. 349, 85 S. W. Rep. 934.

senger car by passing into the baggage compartment and thence out by way of a side door instead of by the regular exit at the rear of the car, it will not necessarily be a negligent act on the part of the passenger, who is thus induced to believe that the way through the baggage compartment is provided in part at least for the egress of passengers, to leave the car by way of the baggage compartment.⁸ So where the passenger, in leaving a ferry-boat, used the ferry-bridge provided for animals and wagons, it appearing that such bridge was used by all other passengers in leaving the boat with the knowledge and acquiescence of the carrier's servants, it was held that in doing so the passenger was not chargeable with contributory negligence, and that the carrier was liable to him for an injury occasioned by the wild careering of one of its horses which it had negligently permitted to come upon the bridge.⁹

Sec. 1190. Alighting from steps of vehicle when danger obvious.—The passenger is bound, while alighting from the vehicle, to exercise ordinary care for his safety. If, therefore, he attempts to alight from the steps of a car which should have three steps but from which the lower one is missing, and he steps where the lower step should be and falls, sustaining injury, his negligence in failing to observe where he is stepping will defeat a recovery for the injury.¹⁰ And where a female passenger is injured in attempting to alight from the car at her destination by means of a small bench which is slippery and placed too far away from the steps of the car for her to reach, her act will be such contributory negligence as will preclude her from the right to a recovery.¹¹ So if a passenger attempts to step from the second step of a car to the depot platform instead of first going down to the third step, and he trips, falls, and sustains injury, his own imprudence in so attempting

8. *Railway Co. v. Long*, 81 Tex. Atl. Rep. 136, 39 Am. St. Rep. 253, 16 S. W. Rep. 1016, 26 Am. 624, 19 L. R. A. 487.
St. Rep. 811.

9. *Watson v. The Railroad*, 55 Penn. St. 436, 48 Atl. Rep. 265.

10. *Coburn v. The Railroad*, 198
11. *McDermott v. The Railway*,
N. J. Law (26 Vroom) 125, 26 82 Wis. 246, 52 N. W. Rep. 85.

to alight from the car will be in law the proximate cause of the injury and he cannot recover.¹²

Sec. 1191. Using ways for leaving depot not intended for that purpose.—If the railway company has furnished a way from its depot which is reasonably safe, it will have performed its duty in that respect, and a passenger who attempts to leave the depot by a way over which the company has not invited him to pass will be chargeable with negligence.¹³ And though the way selected by a passenger in leaving the depot is one which is ordinarily used by passengers, if it has been made temporarily dangerous, and the danger is apparent, it will be negligence for him to attempt to use it where there is another way provided which is safe and direct.¹⁴ But the passenger will not be negligent in undertaking to leave the depot after dark by an indirect way where such way is used for egress as much as the direct way and neither way is lighted.¹⁵

Sec. 1192. (§ 649.) Passing from car to car while train in motion.—Where the passenger, after boarding a railway train, is not assigned to a seat, and he voluntarily attempts to pass from one car to another while the train is in motion in search of one, he will not, in so doing, be chargeable with negligence as a matter of law unless the danger of such a course is so obvious that a reasonably prudent person would not have made the attempt.¹⁶ But if the train is in rapid motion, and he vol-

12. *Kurfess v. Harris*, 195 Penn. St. 385, 46 Atl. Rep. 2.

13. *Abbott v. The Railroad*, 65 N. J. Law, 310, 47 Atl. Rep. 588.

14. *Duverniet v. The Railroad*, 49 La. Ann. 484, 21 So. Rep. 644.

15. *Sullivan v. Canal Co.*, 72 Vt. 353, 47 Atl. Rep. 1084.

16. *Railway Co. v. Clowes*, 93 Va. 189, 24 S. E. Rep. 833.

It is not necessarily negligence for a passenger to pass from one car to another when the train is moving slowly. *Cotchett v. The Railway Co.*, 84 Ga. 687.

The question whether or not a passenger who had just boarded the smoking car, and was passing through that car over the platform to the next coach where he intended to ride, was negligent because he turned aside, grasped the railings on both sides of the step of the platform of the car, and stepped down upon the upper step for the purpose of expectorating, was held to be for the jury and not for the court. *Railway Co. v. Leftwich*, 117 Fed. 127, 54 C. C. A. 1.

untarily and without a necessity or the direction of the conductor or other officer having authority attempts to pass from one car to another, his conduct will be such negligence as will debar him from the right to a recovery for any injury which would not have happened to him had he remained in his place.¹⁷

If, however, the passenger be directed by an agent of the company acting in the line of his duty to pass from one car to another while the train is in motion, and the danger in doing so is not obvious, he will not be negligent in attempting to obey the agent's direction, and if injury ensues, the company will be liable. In *McIntyre v. The Railroad*,¹⁸ there being no seats in the car into which the passenger had just entered, she was directed by some employe of the road, who was probably a

A passenger entering one car of a train at rest found it full and started to go into another. Without looking, and without excuse, she stepped on to the buffers. Just then the train started and she was injured. *Held*, that the company was not liable. *Snowden v. Railroad Co.*, 151 Mass. 220.

Walking over a moving train of flat-cars, or stepping from one to the other, is not negligence *per se*. *Atchison, etc. R. Co. v. McCandliss*, 33 Kans. 366. While a passenger was going from one car to another on a slowly moving train, he was accidentally shot by the conductor. *Held*, his negligence was for the jury. *Gerstle v. Railway Co.*, 23 Mo. App. 361.

17. *Dougherty v. The Railroad*, 84 Miss. 502, 36 So. Rep. 699; *McDaniel v. The Railroad*, 90 Ala. 64, 8 So. Rep. 41; *Bemiss v. The Railroad*, 47 La. Ann. 1671, 18 So. Rep. 711.

Where there is no occasion for the change and the train is running rapidly, and it is night-time,

it will be negligence to pass from one to the other. *State v. Railroad Co.*, 81 Me. 84.

A passenger who voluntarily passes from one car to another while the train is in motion is not *per se* negligent. The question of his conduct is for the jury. *Railroad Co. v. Berg's Adm'r*, 17 Ky. Law Rep. 1105, 32 S. W. Rep. 616. But where the passenger, while searching in the dark for the water closet, walked out upon the platform, opened the door of the vestibule and stepped off the train and was injured, it was held that he was guilty of such contributory negligence as would bar a recovery. *Piper v. Railroad Co.*, 156 N. Y. 224, 50 N. E. Rep. 851, 66 Am. St. Rep. 560, 41 L. R. A. 724, *reversing* 34 N. Y. Supp. 1072, 89 Hun, 75.

18. 37 N. Y. 287, 43 Barb. 532. To the same effect is *Louisville etc. R. Co. v. Kelly*, 92 Ind. 371, where there were no seats and the conductor told her to go into another car. While passing across

brakeman, to go forward into another car, which direction the passenger proceeded to obey, but in doing so, it being at night and very dark, she fell between the cars and was killed. It was said that the act, having been undertaken at the request of the company, was to be regarded as its act, and that to hold that it was not liable under such circumstances would be licensing the grossest wrongs.

So it will not, under ordinary circumstances, be considered a negligent act for the passenger to pass from one car to another in search of water to drink. But where he walks out upon a dark platform at the rear of the train and, without caution, steps off in the dark, his own negligence will bar him from the right to a recovery.¹⁹

Sec. 1193. (§ 650.) Same subject—How when cars are provided with vestibules.—But in determining in any particular case whether the passenger, in attempting to pass from one car to another while the train was in motion, acted negligently,

the platform she was jostled by a brakeman and fell off. *Held*, the company was liable.

If the act of the passenger in passing from one car to another of a moving train is produced by the coercion of the company's employees, or by their actual direction, the question of his negligence is for the jury. *Dougherty v. The Railroad, supra*.

A passenger, by mistake, got upon the wrong train, and was told by the conductor that by taking a rear car he would be able to alight at the next station beyond his destination. He undertook to pass to the rear car while the train was in motion, but in so doing fell from the car platform and was injured. *Held*, that the statement by the conductor did not amount to a command or direction, and that the passenger there-

fore assumed all the risks incident to his undertaking. *Stewart v. The Railroad*, 146 Mass. 605, 16 N. E. Rep. 466. See, also, *Railway Co. v. Choate*, 22 Tex. Civ. App. 618, 56 S. W. Rep. 214; *Butts v. The Railroad*, 110 Fed. 329, 49 C. C. A. 69.

A passenger entered one car of a standing train and found all the seats taken. She was told that another car would be put on, and this car was soon brought up, but the couplings failed to catch and the latter car rebounded away from the other a few feet. The conductor shouted "All aboard;" the passenger started to cross; it was dusk and she fell through. *Held*, that the question of her negligence was for the jury. *Lent v. Railroad Co.*, 120 N. Y. 467.

19. *Hunter v. Railroad Co.*, — S. Car. —, 51 S. E. Rep. 860.

consideration must be given to the character of the platform over which he passed; for conduct in passing over a car platform which would be grossly imprudent on a train where no facilities for protecting the passenger from injury while so doing were provided, might be consistent with a due degree of care and caution on a modern vestibuled train. In fact, the modern railway train with separate dining, smoking and sleeping-cars presents a constant invitation to pass from one car to another, while express invitations to the dining-car, while the train is in rapid motion, are given upon every train to which such cars are attached.²⁰ It cannot be said, therefore, that the passenger who avails himself of the invitation thus offered him would be chargeable with negligence, unless the way provided was obviously dangerous. "In judging of what is negligence in a particular case," said the supreme court of Iowa in *Marquette v. The Railroad*,²¹ "regard is to be had to the growth of science and the improvement of the arts which take place from time to time; for many acts or omissions which are now evidence of gross negligence were but a few years ago consistent with great care and skill. And, on the other hand, many things which a few years since would have been considered negligence are now consistent with proper care and skill. And especially is this true in respect to railroad carriages, which, within a few years, have been transformed from crude and clumsy cars into magnificent traveling palaces, supplied, in many cases, with the comforts, conveniences and even luxuries of elegant dwellings, in which the public may travel at a speed and with a degree of safety which thirty years ago would have been, in the highest degree, perilous to life and limb. And within a very short period there have been such wonderful improvements in the platforms and couplings of railway passenger coaches as that passengers may, with comparative safety, pass from the other cars of a train to the sleeping and dining-coaches on some of the fastest trains

20. See *Costikyan v. The Railroad*, 12 N. Y. Supp. 683.

21. 33 Iowa, 562.

of this country, while in motion. . . . It cannot be true, therefore, as a matter of fact, that to pass from one car to another, while the train is in motion, at the usual rate of speed, is so necessarily dangerous that it may not be justified under any circumstances.”

Sec. 1194. (§ 651.) Occupying exposed position upon vehicle.—So the passenger will be chargeable with contributory negligence if he voluntarily and without a necessity for so doing occupies an exposed position on the vehicle in which he is being carried.²² It has accordingly been held that if a passenger in a railway car voluntarily selects a seat beside an open window with knowledge that sparks and cinders are entering the car through the window, there being other seats available near windows which are closed, his conduct in so exposing himself to danger will be such contributory negligence as will debar him from the right to a recovery for an injury caused by a spark entering the car through the open window; that he may have attempted to close it, but was unable to do so because of the negligence of the railway company in permitting it to be out of repair, will afford him no excuse.²³ So where a passenger by freight train voluntarily left the caboose in which he was riding and assumed a position on the top of one of the cars, it was held that his imprudence in assuming such an exposed position was negligence, and that he was thereby precluded from the right to a recovery for an injury resulting

22. *Ganguzza v. Anchor Line*, 89 N. Y. Supp. 1049, 97 App. Div. 352.

23. *O'Donnell v. The Railroad*, 19 Ky. Law Rep. 1005, 42 S. W. Rep. 846.

But it will not be contributory negligence in the passenger to take a seat and remain sitting near an open window when injury from sparks entering through the window is not reasonably to be anticipated. *Railway Co. v. Flood*,

— Tex. Civ. App. —, 79 S. W. Rep. 1106.

A passenger who, on finding the vestibule doors on the train which he intends to take locked, takes a position on the car steps just outside of the vestibule door will be held to assume all the additional risks which are incident to such an exposed position. *Saunders v. The Railway*, 10 Okl. 325, 61 Pac. Rep. 1075.

from the car upon which he was riding being derailed.²⁴ And where the passenger voluntarily and unnecessarily stood upon the lower step of the car in order to be ready to quickly alight when the train arrived at his destination, and while swinging his body out beyond the outer surface of the car he was struck by an obstruction and injured, it was held that he was guilty of contributory negligence as a matter of law.²⁵

Sec. 1195. Same subject—Effect of carrier's acquiescence or directions.—But if the passenger is invited or directed by a servant, acting within the line of his duty, to occupy an exposed position upon the carrier's vehicle, and such position is not obviously dangerous, it cannot be said that the passenger, in doing so, would be wanting in the exercise of ordinary care for his own safety, and the carrier would be liable to him if he received an injury through its negligence while riding in such position. Thus where a passenger was invited by the train signals to go upon the platform of the car in order to alight at his station where it was not customary for trains to stop, but to slow up for passengers who desired to alight, and while so upon the platform he was thrown from the steps and injured by a sudden increase in speed of the train, it was held that, in assuming a position on the platform, he was not guilty of negligence and that the company was liable to him for the injury.²⁶ So where the passenger, by the direction of an officer, went upon the hurricane deck of a vessel, such deck not being intended for the use of passengers, it was held that, in being where he was, he was not chargeable with contributory negligence.²⁷ And where a passenger who was riding in the caboose of a freight train was ordered by the conductor to go upon the top of the train in order that the caboose might be detached, and whilst so upon the top of a car of the train he was thrown between the cars by a sudden shock produced by a

24. *Chaney v. Railroad Co.*, 176 La. Ann. 735, 17 So. Rep. 260, 49 Mo. 598, 75 S. W. Rep. 595. Am. St. Rep. 382.

25. *Hewes v. Railroad Co.*, 217 Ill. 500, 75 N. E. Rep. 515. 27. *Evers v. Ferry Co.*, — Mo. App. —, 92 S. W. Rep. 118.

26. *Brashear v. Railroad Co.*, 47

concussion of the train with other cars, and was injured, it was held that there had been no such contributory negligence on his part as to deprive him of his remedy against the company for the damages sustained by him.²⁸ The same conclusion was reached where the company undertook to carry the passenger upon the top of its cars;²⁹ but a different result was arrived at where he rode on the top of the car, though by the invitation of the conductor, the court regarding it as an obviously dangerous position.³⁰

Sec. 1196. Same subject—Occupying exposed position not a bar to recovery where it does not contribute to injury.—But while the passenger will be debarred from the right to a recovery by voluntarily occupying an exposed position upon the carrier's vehicle, to have that effect it must appear that the position was selected without the direction of the carrier or his employees, and that the injury would not have occurred had the passenger remained in his place; for if the accident which occasioned it would have been attended with the same results, no matter upon what part of the train or vehicle he may have been, his negligence will be lacking in the element of being the proximate cause of the injury, which is essential to make it an excuse to the carrier.³¹ Where a passenger persisted in

28. *Indianapolis, etc. R. R. Co. v. Horst*, 93 U. S. 291.

29. *Tibby v. The Railway*, 82 Mo. 292. In *Sparks v. Coach Co.*, 6 N. J. Law J. 365, an outside passenger on a stage coach received an injury from the driver's whip. It was held that the proprietor was liable.

30. *Atchison, etc. R. Co. v. Lindley*, 42 Kan. 714. See, also, *Tuley v. The Railroad*, 41 Mo. App. 432.

31. It is well settled that a passenger in a railroad train who is injured by the negligence of the railroad company is not debarred from the right to a recovery because he was, at the time he re-

ceived the injury, negligently riding on the platform of the car or in some other exposed position, if such action on his part did not contribute in any degree to the accident or to his injury. If the accident which occasioned the injury would have happened and would have been attended with the same results to the passenger if he had been in his proper place on the train, his negligence would not be contributory in a sense that would preclude a recovery. *Railway Co. v. White*, 67 Fed. 481, 14 C. C. A. 483, 32 U. S. App. 192, citing *Hutchinson on Carr.*

If the passenger is standing on

riding upon the top of a stage-coach against the advice of the agent of its owner, who told him that if he kept his seat on the outside he must do it at his own risk, and while so riding the stage was upset by the negligence of the driver, and the passenger was injured, it was held that he could recover for the injury.³² "It may be true," said Appleton, J., "that the plaintiff by riding outside incurred the peculiar risks, if there were any, arising from his exposed position. But that is all. He did not assume those resulting from the negligence of the defendant or those in his employ. He or they would not be exonerated from their duties, and if the plaintiff was injured through his or their neglect, he being in the exercise of ordinary and common care, in no way contributing to the injury by his position, he might well maintain this suit."³³

Sec. 1197. (§ 652.) Voluntarily riding on platform while train in motion.—Where the railway company has provided a safe and secure place for passengers to ride within its cars, a passenger who voluntarily and unnecessarily takes a position upon the platform of the car while the train is in motion will, in so doing, be chargeable with such contributory negligence as will preclude him from the right to recover for an injury which would not have befallen him had he been in his proper place.³⁴ Thus in *Hickey v. The Railroad*,³⁵ it was held as a

the car platform, and is injured by an engine colliding with the car, there being no proof but that the injury would have resulted had he been within the car, he will not be debarred from the right to a recovery. *Dewire v. The Railroad*, 148 Mass. 343, 19 S. E. Rep. 523.

See, also, *Railroad Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. Rep. 971, citing *Hutchinson on Carr.*; *Carrico v. The Railroad*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50.

32. *Keith v. Pinkham*, 43 Maine, 501.

33. Though the passenger's position might have contributed to some other injury, yet if it in no way contributed to the one in question, it will not defeat a recovery. *Passenger R'y Co. v. Boudrou*, 92 Pa. St. 475; *Moakler v. Railway Co.*, 18 Ore. 189.

34. *Worthington v. The Railroad*, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326; *Meyere v. The Railway*, 110 Tenn. 166, 72 S. W. Rep. 114; *Goodwin v. The Railroad*, 84 Me. 203, 24 Atl. Rep. 816; *Benedict v. The Railroad*, 86 Minn. 224, 90 N. W. Rep. 360, 91 Am. St. Rep. 345, 57 L. R. A. 639;

Scheiber v. The Railway, 61 Minn. 499, 63 N. W. Rep. 1034; *Jammison v. The Railway*, 92 Va. 327, 23 S. E. Rep. 758, 53 Am. St. Rep. 813; *Kerr v. The Railway*, 100 Ill. App. 148.

See, also, *Malcom v. Railroad Co.*, 106 N. C. 63; *Memphis, etc. R'y Co. v. Salinger*, 46 Ark. 528; *Alabama, etc. R. Co. v. Hawk*, 72 Ala. 112; *Merrill v. Railroad Co.*, 139 Mass. 238; *Smotherman v. Railway Co.*, 29 Mo. App. 265; *Baltimore, etc. R. R. Co. v. Cason*, 72 Md. 377, 20 Atl. Rep. 113.

A passenger who voluntarily leaves the car as it nears his station and stands upon the steps is guilty of such contributory negligence as will bar a recovery if the steps are struck by some obstruction, and he is thereby injured. *Fletcher v. The Railroad*, 187 Mass. 463, 73 N. E. Rep. 552, 105 Am. St. Rep. 414.

Where the passenger is unnecessarily riding upon the platform of a moving car, it is his duty to go within when requested to do so by the conductor or other person in charge if there be standing room in the car; and if he be so requested, and he refuses to go within the car, he cannot recover for an injury received in later falling from the platform. *Fisher v. The Railroad*, 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758.

A passenger who goes upon the car platform while the train is in motion, in violation of the company's rules which are known to him, preparatory to debarking at a regular stopping place, the train continuing to run by the platform at the rate of 8 or 9 miles an hour, and who is thrown from the

platform by a sudden jerk of the train and injured, is properly nonsuited. *Denny v. The Railroad*, 132 N. Car. 340, 43 S. E. Rep. 847.

The failure on the part of the railway company to enforce a rule prohibiting passengers from standing upon the platforms of moving trains will not excuse the negligence of a passenger in so doing where he has been requested by those in charge of the train not to remain on the platform. *Houston, etc. R. Co. v. Bryant*, — Tex. Civ. App. —, 72 S. W. Rep. 885.

A passenger who takes a position on the platform of an interurban electric car while it is passing through the country at a high rate of speed is chargeable with contributory negligence. *Railroad Co. v. Lohe*, 68 Ohio St. 101, 67 N. E. Rep. 161, 67 L. R. A. 637.

35. 14 Allen, 429.

Where the passenger voluntarily and unnecessarily goes out on to the platform as the train is about to start (*Torrey v. Railroad Co.*, 147 Mass. 412); or as soon as the station is announced and while the train is yet running rapidly he will be negligent. *Blitch v. The Railroad Co.*, 76 Ga. 333.

So a passenger who sits on the rear end of an open car, with his feet elevated and nothing to protect himself against sudden jerks, is guilty of contributory negligence when he is thrown off. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. Rep. 331.

But, as has been observed by some courts, the modern improvements for safety in railway cars, platforms, train appliances and roadways have largely modified

matter of law that when the passenger, while standing on the outside of the car upon its platform, was injured by a collision of the cars of the company, caused by the negligence of its employees, he was wanting in that due care and caution without which the company could not be held liable; and it was said that if passengers voluntarily take exposed positions, with no occasion therefor nor inducement thereto caused by the managers of the road, they take the special risk of that position upon themselves. And it made no difference, it was said, that it was customary with the passengers upon the road under the same circumstances to come out of the car and stand upon its platform preparatory to alighting from it, the train having reached its destination, nor that this fact was known to the conductor, and that he did not remonstrate with or caution the passengers against doing so, either in the particular instance or at any other time.

But in an action by the passenger who has received an injury while riding upon the platform of a moving railway car, it would be essential to the defense of the company that the passenger's imprudence in assuming such a position should have been the proximate cause of the injury, or, in other words, that it would not have happened if he had not thus exposed himself; for, if the cause of the injury would have been attended with the same results to the passenger had he been within the car, his negligence in standing upon the platform would not in law be considered the proximate cause of the injury, and the railway company would be responsible.³⁶

the risk of standing on a car platform while the train is in motion. *Graham v. McNeill*, 20 Wash. 466, 55 Pac. Rep. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300.

36. *Marquette v. The Railroad*, 33 Iowa, 562, *Huelsencamp v. The R'y*, 34 Mo. 45; *Passenger R'y Co. v. Boudrou*, 92 Penn. St. 475.

In Treat v. The Railroad, 131 Mass. 371, a passenger was in-

jured while standing on a car platform by the overturning of the car. It was held that since his position on the platform of the car while it was in motion did not subject him to injury from such a cause any more than if he had been in the car, the company was liable. See also, *Railway Co. v. White*, 67 Fed. 481, 14 C. C. A. 483, 32 U. S. App. 192.

If, however, the passenger be induced by the conduct of the employees of the railway company, or by the invitation or direction of an agent acting in the line of his duty, to take a position upon the platform of a car while the train is in motion, he will not be negligent as a matter of law in doing so unless the train is running at a high rate of speed or other conditions exist which make his presence upon the platform manifestly dangerous; and, in the absence of such conditions, the question of his negligence will be for the jury.³⁷ It has been held, therefore, that if the conductor, or a brakeman acting within

37. *Railway Co. v. Roebuck*, 132 Ala. 412, 31 So. Rep. 611; *Railroad Co. v. Meyers*, 62 Fed. 367, 10 C. C. A. 485, 18 U. S. App. 569; *Choate v. The Railway*, 67 Mo. App. 105; *Railway Co. v. Smith*, 79 Ark 179, 67 S. W. Rep. 865.

Though the conductor of a train promises to stop at a certain station to enable a passenger to alight, and directs the passenger to be on the platform and ready to step off when the train stops, such direction will not excuse the presence of the passenger on the platform when the train in no manner slackens its speed, but continues to run by the station at 45 miles an hour. *Hicks v. The Railway*, 108 Ga. 304, 32 S. E. Rep. 880.

But a passenger has been held not to be negligent in assuming a position on the platform of a moving car when the conductor sees him there and collects his fare without objection. *Olivier v. The Railroad*, 43 La. Ann. 804, 9 So. Rep. 431.

So the passenger has been held not to be chargeable with negligence in riding upon the platform, when he goes out upon it, as the

train is stopping at his station, for the purpose of getting off (*Schultze v. Railway Co.*, 32 Mo. App. 438); nor where he goes out to get off, and stays no longer than to find that the train is not going to stop (*Central, etc. R. Co. v. Miles*, 88 Ala. 256, 6 S. Rep. 696); nor where he is going to find a seat in another car. *De-wire v. Railroad Co.*, 148 Mass. 343.

It is not contributory negligence for a female passenger to step upon the car platform, while the train is standing at an intermediate station, to greet a friend, the conductor having previously told her that the train would stop at such station for ten or fifteen minutes; and if she is injured by a sudden jerk of the train, the railroad company will be liable. *Railroad Co. v. Smith*, 95 Va. 187, 28 S. E. Rep. 173.

The question whether or not a passenger who takes a position upon the platform of a moving car is, in so doing, chargeable with negligence, should be decided by the jury in view of the speed of the train, the age and physical condition of the passenger and the

the scope of his authority, invites or directs the passenger to go upon the platform for the purpose of alighting at his destination, or if the whistle is blown and the speed of the train is slackened as it approaches his station, and he goes upon the platform preparatory to getting off, no danger being apparent, he will not, in so doing, be chargeable with negligence as a matter of law, and it will be for the jury to decide whether he acted as a person of ordinary prudence would have acted under like circumstances.³⁸

Sec. 1198. (§ 653.) Same subject—How when car full.—If, however, the railway company has permitted the car to be overcrowded, the passenger will not as a matter of law be chargeable with negligence in riding upon the platform, and the question whether in any particular case he was justified in doing so will ordinarily be one of fact for the jury.³⁹ But

reasons which he had for so placing himself. *Railroad Co. v. Snider*, 118 Ga. 146, 44 S. E. Rep. 1005. See, also, *Graham v. McNeill*, 20 Wash. 466, 55 Pac. Rep. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300.

Whether standing upon the platform of a railway car while the train is in motion would be evidence of the want of such reasonable care on the part of the passenger as would exonerate the railway company from liability to him in case of accident resulting in his injury, would ordinarily be a question of fact for the jury. *Nolan v. Railroad Co.*, 87 N. Y. 63; *Morrison v. Railroad Co.*, 56 N. Y. 367; *Ginna v. Railroad Co.*, 67 N. Y. 596; *Willis v. Railroad Co.*, 34 N. Y. 670; *Goodrich v. Railroad Co.*, 29 Hun, 50; *Gerstle v. Railway Co.*, 23 Mo. App. 361; *Werle v. Railroad Co.*, 98 N. Y. 650; *Willmott v. Railway Co.*, 106 Mo. 535, 16 S. W. Rep. 500.

38. Railroad Co. v. Head, 22 Ky. Law Rep. 863, 59 S. W. Rep. 23.

39. Werle v. Railroad Co., 98 N. Y. 650; *Nolan v. Railroad Co.*, 87 N. Y. 63; *Morrison v. Railroad Co.*, 56 N. Y. 367; *Ginna v. Railroad Co.*, 67 N. Y. 596; *Gerstle v. Railway Co.*, 23 Mo. App. 361; *Bonner v. Glenn*, (Tex.) 15 S. W. Rep. 572; *Lynn v. Southern Pacific Co.*, 103 Cal. 7, 36 Pac. Rep. 1018, 24 L. R. A. 710; *Benedict v. The Railroad*, 86 Minn. 224, 90 N. W. Rep. 360, 91 Am. St. Rep. 345, 57 L. R. A. 639; *Railroad Co. v. Newell*, 212 Ill. 332, 72 N. E. Rep. 416; *Railroad Co. v. Dumser*, 161 Ill. 190, 43 N. E. Rep. 698; *Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *Railway Co. v. Lang's Adm'r*, 100 Ky. 221, 38 S. W. Rep. 503; s. c. 40 S. W. Rep. 451; s. c. 41 S. W. Rep. 271; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. Rep. 631, 72 Am. St. Rep. 121, 43 L. R. A. 300; *Dennis v. The Railroad*, 165 Penn. St. 624,

when the car is overcrowded, and in consequence the passenger is obliged to ride upon the platform, he must exercise for his safety a degree of care commensurate with the increased danger usually incident to such an exposed place, and, if he fails to do so, and injury results, his conduct will preclude him from the right to a recovery.⁴⁰

While there are cases⁴¹ which hold that the passenger will be justified in riding upon the platform if he is unable to obtain a seat in the car, the better* rule would seem to be that if there is standing room within the car, he should stand inside rather than expose himself to peril by riding upon the platform.⁴² He

31 Atl. Rep. 52; *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. Rep. 684; *Pennsylvania Co. v. Paul*, 126 Fed. 157, 62 C. C. A. 135; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536; *Railway Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. Rep. 879; *Railway Co. v. Morris*, 94 Tex. 505, 61 S. W. Rep. 709; *Choate v. The Railway*, 67 Mo. App. 105; *Schaefer v. The Railway*, 51 N. Y. Supp. 431, 29 App. Div. 261; *Graham v. The Railway*, 149 N. Y. 336, 43 N. E. Rep. 917, *reversing*, s. c. 28 N. Y. Supp. 739, 8 Misc. R. 305; *Williams v. The Railroad*, 28 Tex. Civ. App. 503, 67 S. W. Rep. 1085.

A notice forbidding passengers to ride on car platforms will be deemed to have been waived where passengers are received, and there is not sufficient room within the cars for them to ride. *Graham v. McNeill*, *supra*.

Where by reason of the number of people in advance of him, a person is unable to get safely upon the car platform, and while clinging to the railing he inadvertently projects his body beyond the line of the car in such a manner that

it is struck by a car negligently left standing upon a side track, the question of his negligence is for the jury. *Railway Co. v. Kelsey*, 180 Ill. 530, 54 N. E. Rep. 608.

A passenger on an excursion train has the right to return home on the same train by which he was taken out, and if, by reason of the crowded condition of the train on the return trip, he is unable to secure a place inside a car, he will not be negligent in occupying a place upon the platform. *Jackson v. The Railway*, 144 La. 982, 38 So. Rep. 701, 70 L. R. A. 294.

40. *Magrane v. The Railway*, 183 Mo. 119, 81 S. W. Rep. 1158; *Graham v. McNeill*, *supra*.

41. *Willis v. The Railroad*, 34 N. Y. 670, 32 Barb. 398; *Colegrove v. The Railroad*, 20 N. Y. 492.

42. *Worthington v. The Railroad*, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326; *Meyere v. The Railway*, 110 Tenn. 166, 72 S. W. Rep. 114; *Herdman v. The Railroad*, 62 Hun, 621, 17 N. Y. Supp. 198.

A passenger will not be justified in exposing himself to danger by

is not required, however, to disregard the usual courtesies of life in order to get an advantage over other passengers in securing a place within the car. If, therefore, the car should be so crowded that the passenger in the exercise of reasonable prudence would be justified in concluding that he could not get inside without unreasonably pushing or crowding his way, he would be under no duty to attempt to enter, and it would not be negligence for him under such circumstances to ride upon the platform.⁴³

Sec. 1199. Riding on platform to better escape impending danger—How when car unfit for physical comfort.—So the passenger will not, as a matter of law, be chargeable with contributory negligence in riding upon the platform of the car in order to better escape what reasonably seems to him an impending danger to which the agents of the railway company

standing upon the platform of a rapidly moving car merely because the car is crowded and he is unable to obtain a seat. *Worthington v. The Railroad*, *supra*.

A minor, fifteen years of age and of average intelligence, will be guilty of contributory negligence in going upon the lowest step of a car platform in order to vomit, the train being in rapid motion, although there was only standing room inside the car. *Railway Co. v. Moneyhun*, 146 Ind. 147, 44 N. E. Rep. 1106, 34 L. R. A. 141.

If the passenger, while riding upon the platform of the car, be directed by the conductor to go inside, he should do so if there be standing room within the car. *Fisher v. The Railroad*, 39 W. Va. 366, 19 S. E. Rep. 578, 23 L. R. A. 758.

In *Quinn v. The Railroad*, 51 Ill. 495, the passenger was riding upon the platform. He paid his fare to the conductor, who gave

him a bill in change, which was blown from their hands, and the passenger, in attempting to catch it, fell from the platform upon which he was at the time standing, and was killed by the train. It was held that the company was not liable, although the cars were crowded and the passenger could not probably have found a seat if he had so desired. It was thought by the court that, if he could not have found a seat, he should have stood within the car instead of upon the platform. But where a passenger, who could not find a seat, became sick and faint because of the crowded condition of the car, and took a position on the platform to relieve his sickness, it was held that, in doing so, he was not guilty of contributory negligence. *Morgan v. Railway Co.*, — Mich. —, 101 N. W. Rep. 836, 70 L. R. A. 609.

43. *Ward v. The Railroad*, 102 Wis. 215, 78 N. W. Rep. 442;

have subjected him by running the train at a perilous rate of speed,⁴⁴ or by operating it in a negligent manner,⁴⁵ and it will ordinarily be a question for the jury whether under the circumstances he was justified in doing so.

And it has been held that if the passenger, because of a feeling of faintness produced by conditions within the car which render it unfit for physical comfort, takes a position upon the platform from which he later falls in a faint and receives injury, he will not, as a matter of law, be chargeable with such contributory negligence in going upon the platform as will prevent him from maintaining an action.⁴⁶

Sec. 1200. (§ 654.) Riding in baggage or mail-car.—Riding in the baggage or mail-car of a train certainly exposes the passenger to greater risks than those to which he would be exposed when seated in a car intended for passengers, and if he should, while voluntarily and unnecessarily riding in that position, without the express or implied consent of the company, sustain an injury which would not have befallen him had he been in his appropriate place, there is no doubt that the company would be exonerated from all liability to him.¹ But if the

Rolette v. The Railway, 91 Minn. 16, 97 N. W. Rep. 431; *Railroad v. Newell*, 113 Ill. App. 263; s. c. affirmed in 212 Ill. 332, 72 N. E. Rep. 416; *Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406.

44. *Mitchell v. The Railroad*, 87 Cal. 62, 25 Pac. Rep. 245.

45. *Railway Co. v. Smith*, 70 Ark. 179, 67 S. W. Rep. 865.

46. *Morgan v. Railway Co.*, — Mich. —, 101 N. W. Rep. 836, 70 L. R. A. 609; *Fox v. The Railroad*, — Mich. —, 101 N. W. Rep. 624, 68 L. R. A. 336; but see dissenting opinion in this case to the effect that only something dangerous or serious in character will justify a passenger in voluntarily occupying a position upon

the platform of a rapidly moving train.

1. *Pennsylvania Co. v. Langdon*, 92 Penn. St. 21; *Houston, etc. R. Co. v. Clemmons*, 55 Tex. 88; *New York, etc. R. Co. v. Ball*, 53 N. J. 283, 21 Atl. Rep. 1052; *Railroad Co. v. Root*, 49 Neb. 900, 69 N. W. Rep. 397; *Railway Co. v. Jordan*, 25 Ky. Law Rep. 574, 76 S. W. Rep. 145.

It is no excuse in such a case that the conductor ought to have discovered him and ordered him out. *Kentucky Cent. R. Co. v. Thomas*, 75 Ky. 160.

But if the passenger step into the baggage-car for the purpose of seeing the conductor upon legitimate business connected with his

passenger be directed to ride in the baggage-car by an agent of the company acting in the line of his duty, and the place is not one of obvious danger, he will not, in obeying such direction, be chargeable with negligence.² Nor will the fact that he in thus riding in the baggage-car defeat his right to recover for an injury to which his position in no manner contributed,³ nor will it where he is so riding, under circumstances not obviously dangerous, by the express or implied permission of the carrier or his agents.⁴ Where the passenger was one who, in

journey, he will not, in so doing, necessarily be chargeable with negligence. The question of his negligence in such a case would be for the jury. *Gardner v. Air Line Co.*, 97 Ga. 482, 25 S. E. Rep. 334, 54 Am. St. Rep. 435; s. c. 94 Ga. 538, 19 S. E. Rep. 757

2. *Railroad Co. v. Swann*, 81 Md. 400, 32 Atl. Rep. 175, 31 L. R. A. 313.

3. *Webster v. Railroad Co.*, 115 N. Y. 112.

Where a passenger riding in the smoking compartment, seeing a collision inevitable, went into the baggage-car in order to be prepared to jump, and did jump before the trains collided, it was held that the question of his negligence was for the jury. *Cody v. Railroad Co.*, 151 Mass. 462.

Where the passenger voluntarily assumes a position in the baggage-car, such act will not avail the company as a defense to an action by the passenger for an injury received as the result of an assault or an unwarranted act by the company's servants. *Railroad Co. v. Root*, 49 Neb. 900, 69 N. W. Rep. 397.

4. *Carroll v. Railroad Co.*, 1 Duer, 571; *Washburn v. The Railroad*, 3 Head, 638; *Railway Co. v.*

Parsley, 6 Tex. Civ. App. 150, 25 S. W. Rep. 64.

In *Baltimore, etc. R. Co. v. State*, 72 Md. 36, a postal clerk, while off duty and on his way home, and being entitled to ride on the train, voluntarily left the smoking-car, in which he had been riding, and went to ride in the postal-car. It was the custom to allow such clerks, under like circumstances, to ride either in the postal-car or the passenger-cars. While so riding he was killed by defendant's negligence, though no one in the smoking-car was injured. Said the court: "It may be that the location of the postal-car was, by reason of its greater proximity to the engine, a place of greater danger than the smoking-car or other passenger-cars. Still it was a car for the occupancy of passengers who were entitled to ride as such, because of their official position or connection with the postoffice department of the government or who paid their fare and was (*sic.*) connected with that department. There was no rule of the company forbidding the deceased to enter that car and occupy the same, if he was not in actual service. It was his habit to occupy it when he was return-

performing service for the company as a mechanic, made frequent trips upon the road in going to and returning from his work, and was in the habit of voluntarily selecting the baggage-car as the most appropriate place for him, with the knowledge of and without any objection by the conductor, it was held that he rode in it by the permission of the company, and could not be charged with contributory negligence in doing so.⁵

ing from duty whenever he chose, and the conductor, who is conceded to be a general agent of the company, not only made no objection, but permitted him from time to time to do so. There are cases, no doubt, where the invitation or permission of the conductor would not protect a man in running a risk which was so obviously dangerous that a prudent man would not think of incurring it. Patterson's Railway Accident Law, sec. 276, and cases cited. To justify a court in saying that conduct is *per se* contributory negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion as to its imprudence in the minds of ordinarily prudent men. Baltimore, etc. R. Co. v. Kane, 69 Md. 21; Cumberland Valley R. Co. v. Maugans, 61 Md. 61; Baltimore, etc. R. Co. v. Fitzpatrick, 35 Md. 46; Baltimore, etc. R. Co. v. State, 54 Md. 655. Here the deceased was doing what he was actually required to do for the larger part of his time on the cars, and was permitted to do the rest of his time when on the cars. It was provided for his occupancy when on duty as postal clerk, and his not being on duty did not make the car more dangerous to him. His act therefore

in no way contributed to the result which happened. A case precisely like it, being the case of a postal clerk not on duty and in the postal-car, and injured while there by the gross negligence of the company's agents, is found in Carroll v. Railroad Co., 1 Duer, 578 (*supra*). The plaintiff in that case was in the postal-car by the permission of the conductor, and was allowed to recover damages. The same principles were given effect in O'Donnell v. Railroad Co., 59 Penn. St. 239, and in Creed v. Railroad Co., 86 Penn. St. 139. In the last case the court says no legal presumption of negligence can arise from the fact that the passenger was in a car not intended for passengers. In Pennsylvania R. Co. v. Langdon, 92 Penn. St. 27 (*supra*), there was an emphatic rule of the company, forbidding a passenger to ride in a baggage-car, which was controlling."

See, also, Gulf, etc., R'y Co. v. Wilson, 79 Tex. 371, 15 S. W. Rep. 280; McGoffin v. Railway Co., 102 Mo. 540, 15 S. W. Rep. 76, distinguishing Railroad Co. v. Price, 96 Penn. St. 256, and Price v. Railroad Co., 113 U. S. 218.

5. O'Donnell v. The Railroad, 59 Penn. St. 239.

It has been held that, even though the passenger rides in the baggage-car against the rules of the company of which he is informed, if he is in it with the knowledge of the conductor, and without any attempt on his part to enforce the rule by removing the passenger, his presence there would not be such negligence as would exonerate the company from the consequence of its negligence or want of care.⁶ But it is doubtful if the rule, as thus stated, is sound. It would seem that where the company has adopted a rule forbidding passengers to ride in the baggage-car, the very purpose of such a rule being to protect its passengers from harm, if the passenger knowingly violates it, and injury results to him from which he would have escaped had he remained in the car set apart for his accommodation, the mere fact that the conductor was cognizant of his presence in the baggage-car and made no effort to enforce the rule ought not to excuse his conduct in knowingly violating it by going into a car the very nature of which would suggest that it was not intended for passengers.⁷ So if a person, knowing of such a rule, collusively agree with the baggage-master to ride in the baggage-car, the railway company will not be liable to him for an injury sustained by later being forced from the car by the baggage-master while the train is in motion.⁸ If, however, the railway company by its conduct holds out its employees who are charged with the control of its trains as being authorized, notwithstanding such a rule, to consent to passengers riding in the baggage-car, or if the employees have allowed passengers so generally and constantly to ride in the baggage-car that the company would be charged with having knowledge of and acquiescing in the violation of the rule, the company would be deemed to have abandoned it, and the conduct of the passenger in riding in the baggage-car under such circumstances would be no defense to the company

6. *Jacobus v. The Railway*, 20 1, 11 So. Rep. 506, 32 Am. St. Rep. Minn. 125. See, also, *Philadelphia*, 17, 16 L. R. A. 631.

etc. *R. Co. v. Derby*, 14 How. 468. 8. *Yazoo, etc., R. Co. v. Anderson*, 77 Miss. 28, 25 So. Rep. 865.

7. *Railroad Co. v. Hirst*, 30 Fla.

in an action against it for an injury sustained through its negligence.⁹

Sec. 1201. Riding in show-car.—If the passenger ride in the show or baggage-car of a traveling show company, after being warned not to do so by the conductor, he will be chargeable with contributory negligence. But where the passenger, while acting in the direct line of his duty, rides in a strong well built show-car for the purpose of looking after show-property belonging to his employer, and he is allowed to remain there without any effort on the conductor's part to induce him to return to the passenger-coach, he will not, in so riding, be chargeable with such negligence as will bar a recovery for an injury suffered by reason of the railway company's negligence.¹⁰

Sec. 1202. (§ 654a.) Stockmen riding in stock-cars.—If the railway company has provided a caboose for the accommodation of stockmen who are traveling by freight train for the purpose of caring for their live stock, it will ordinarily have performed its duty in respect to furnishing such persons a suitable place in which to ride. A stockman, therefore, who voluntarily and unnecessarily rides in the stock-car will thereby be chargeable with such contributory negligence as will preclude him from the right to recover for an injury which would not have befallen him had he been in his proper place.¹¹ But where a stockman had assumed the entire duty of caring for his stock, and the contract did not provide that he should re-

9. See *Railroad Co. v. Hirst*, *supra*.

10. *Blake v. The Railway*, 89 Iowa, 8, 56 N. W. Rep. 405, 21 L. R. A. 559, *reversing*, s. c. 78 Iowa, 57, 42 N. W. Rep. 580.

11. *Walker v. Green*, 60 Kan. 289, 56 Pac. Rep. 477. See, also, *Player v. The Railroad*, 62 Iowa, 723, 16 N. W. Rep. 347.

But where the stockman is caring for his stock, and the train is started before he has been af-

forded a reasonable opportunity to do so, no negligence can be attributed to him because when injured, he was riding in the stock-car. *Florida, etc. R. Co. v. Webster*, 25 Fla. 394.

Whether sufficient time was given him to care for his stock will be a question of fact for the jury. *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210.

main in the caboose while the train was in motion, it was held that knowledge on the part of the company that he was riding in the car with the stock was equivalent to an assignment to him of the place, and that he was not thereby debarred from the right to recover for an injury suffered on account of the railway company's negligence.¹² "Looking at the matter (in view of the nature of the stockman's duties) from the view point of a man whose only relation with the railroad company consists of a single shipment," said the court, "we venture to say that it would scarcely occur to him that his peril was augmented by riding in a freight car in the middle of the train, rather than in the caboose, or that he was in any sense a wrongdoer in riding in the car with his stock the safe keeping of which the company had expressly devolved upon him." So if a stockman ride in the stock-car in pursuance of a contract with the railway company that he shall do so to care for his stock, or in pursuance of a custom of the particular road permitting stockmen to ride in the cars with their stock, he will not, in doing so, be chargeable with contributory negligence.¹³

The railway company may, however, provide by contract with the stockman that he shall ride in the caboose attached to the train; and where such a contract has been entered into, no recovery can be had for an injury received while riding in the stock-car which would not have occurred had he been in the caboose.¹⁴ But even though the stockman be required by contract to ride in the caboose, if it were also provided that

12. *Lake Shore, etc. R'y Co. v. Teeters*, — Ind. —, 77 N. E. Rep. 599, *affirming* (Ind. App.) 74 N. E. Rep. 1014.

13. *Lawson v. The Railroad*, 64 Wis. 447; *Railway Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 356. See, also, *Railway Co. v. Teeters*, — Ind. App. —, 74 N. E. Rep. 1014; *s. c. affirmed*, — Ind. —, 77 N. E. Rep. 599; *Evansville, etc. R. Co. v. Mills*, — Ind. App. —, 77 N. E. Rep. 608.

That such a person is a passenger, see *ante*, § 1003.

14. *Heumhreus v. The Railroad*, 8 S. Dak. 103, 65 N. W. Rep. 466; *Ill. Cent. R. Co. v. Jennings*, 217 Ill. 140, 75 N. E. Rep. 457; *Lake Shore, etc R'y Co. v. Teeters, supra*.

But a provision in a contract with a railroad company for the carriage of live stock "that the person or persons in charge of live stock covered by this contract shall remain in the caboose car

he should assume the duty of caring for his stock, evidence that it was absolutely necessary for him, at the time of the injury, to be in the car with the stock would be admissible. So, also, evidence that there was a general and uniform custom for stockmen under similar contracts to ride in the cars with their stock would properly be admissible as tending to show a waiver of the requirement that the stockman should ride in the caboose.¹⁵

Sec. 1203. Same subject.—Passing over tops of cars while train is in motion.—It will ordinarily be considered a negligent act on the part of the stockman to voluntarily and unnecessarily pass over the tops of the cars while the train is in motion; and if, while so doing, he should receive an injury which would not have happened had he been in the place provided for him, he will be without remedy.¹⁶ But where it has become

attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose or pass over or along the cars or track they shall do so at their own risk of personal injury from any cause whatever," does not apply to an injury received in a stock-car while the train is not in motion. *Railway v. Reeder*, 170 U. S. 530, 18 Sup. Ct. Rep. 530, *affirming s. c.* 76 Fed. 550, 22 C. C. A. 314.

15. *Railroad Co. v. Dickson*, 143 Ill. 368, 32 N. E. Rep. 380; *Railway Co. v. Cook*, 12 Tex. Civ. App. 203, 33 S. W. Rep. 669; *Railway Co. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W. Rep. 769; *Heumphreus v. The Railroad*, *supra*.

16. *Atchison, etc., R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. Rep. 703; *Kimball v. Palmer*, 80 Fed. 240, 25 C. C. A. 394.

But see *Saunders v. The Railroad*, 13 Utah, 275, 44 Pac. Rep. 932, where a shipper of live stock,

while returning over the tops of the cars of a moving freight train to the caboose, was struck by a snow-shed and injured, and it was held that his act in passing over the tops of the cars was not *per se* negligence.

Where the shipper of live stock has contracted with the railway company to remain in the caboose while the train is in motion, and he voluntarily stands or walks upon the tops of the cars in violation of the provisions of such contract, he cannot recover for injuries received by him while so doing. *Railway Co. v. Sparks*, 55 Kan. 288, 39 Pac. Rep. 1032.

But where a rule provided that stockmen should ride in the caboose, and that a failure to comply with such rule should be *prima facie* evidence of negligence, it was held that a violation of the rule would not necessarily preclude a recovery, but would only cast upon the person

customary for the railway company to permit stockmen, in order to properly care for their stock, to pass over the tops of the cars while the train is in motion, it will not, as a matter of law, be a negligent act for the stockman to pass over the tops of the cars in accordance with such custom; and if, while so passing over the cars, he should sustain injury on account of some negligent act or omission on the part of the railway company, the question whether, in view of all the circumstances, he was justified in taking such a course will be one of fact for the jury.¹⁷

Sec. 1204. Same subject—Stockmen riding on engine.—Ordinarily, where suitable accommodations are provided for the carriage of stockmen, a stockman who voluntarily rides upon the engine will be held to assume the increased hazards which are incident to that position. But where the contract required the stockman to ride upon the train with his stock, and, for some distance, no caboose was attached to the train and in consequence he rode on the engine, it was held that he was lawfully on the engine.¹⁸ And where a stockman had the right to accompany his stock, and on account of the caboose being detached at an intermediate point he was invited by the engineer to ride on the engine, it was held in an action for an injury, resulting from the servants of the company attempting to make a running switch, that the question whether he was rightfully on the engine was for the jury.¹⁹ So where the contract provided that the stockman should ride in the caboose while the train was in motion, and, while riding on the engine by the direction of the conductor, he sustained injury through the negligence of the company, it was said that, "If, under all

guilty of a breach of it the burden of disproving contributory negligence. *Missouri, etc., Ry. Co. v. Avis*, — Tex. —, 93 S. W. Rep. 424. s. c. 18 Utah, 244, 55 Pac. Rep. 364; *Railroad Co. v. Thomas*, 60 Fed. 379, 9 C. C. A. 29, 23 U. S. App. 37.

17. *Railway Co. v. Carpenter*, 56 Fed. 451, 5 C. C. A. 551, 12 U. S. App. 392; *Nelson v. The Railroad*, 15 Utah, 325, 49 Pac. Rep. 644; 18. *Southern Ry. Co. v. Cullen*, — Ill. —, 77 N. E. Rep. 470.

19. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. Rep. 197, 5 Am. St. Rep. 510.

the circumstances, the act of the conductor was within the apparent scope of his authority, and the shipper did not know of any limitation upon such authority, the carrier would be bound;'' that the burden of proof would be on the shipper to show that it was within the apparent scope of the authority of the conductor to waive the benefit of the contract, and that he did not have reasonable grounds to believe that the conductor was exceeding his authority. These questions, it was also said, were to be determined from all the facts and circumstances and were for the jury.²⁰

Sec. 1205. (§ 654b.) Riding on hand-car.—A person who rides on a hand-car at the invitation of a section-foreman is not a passenger, and the railway company will not be liable to him for any injury received while so riding unless such injury be wantonly or intentionally inflicted.²¹ But where a person, ignorant of any limitation upon the train-master's authority, is invited to ride on one by the train-master of the company, for the purpose of accomplishing an object in which the company is interested, as to hold an inquest upon a dead body found upon the track, such person will be deemed to be lawfully upon the car, and the company will be bound to exercise at least ordinary care for his safety.²²

Sec. 1206. (§ 654c.) Interfering with management of vehicles.—The passenger has ordinarily no right and is not bound to interfere with the management of the carrier's vehicle or his conduct of the journey. He may ordinarily trust to the carrier's performance of his duty of safe transportation, without regard to suggestions or advice from the passenger. Thus it has been held that the passenger is not chargeable with contributory negligence because he failed to warn the engineer of an impending collision;²³ nor does it excuse the carrier that the driver of a road-vehicle drove out of the road in

20. Ill. Cent. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. Rep. 457.

21. Rathbone v. The Railroad, 40 Or. 225, 66 Pac. Rep. 909.

22. International, etc., Ry. Co. v. Prince, 77 Tex. 560.

23. Grand Rapids, etc., R. R. v. Ellison, 117 Ind. 234.

the dark because the passenger suggested that he was getting out of the track.²⁴

Sec. 1207. (§ 654d.) Using unsafe platforms on depot premises.—The passenger has the right to assume that the platform, over which the railway company has invited him to pass, is reasonably safe for its intended purpose, and he will not necessarily be chargeable with contributory negligence if he omits to look at each step he takes for the purpose of avoiding defects or discovering obstructions which the company may have placed upon it.²⁵ Nor will he be chargeable with contributory negligence if, while lawfully upon it, he makes use of other parts than those lying immediately between the entrance to the platform and the place intended for passengers to board the vehicle.²⁶ And although the passenger may have known that the platform was previously out of repair, he may rely upon the performance by the carrier of his duty to repair it, and he will not be chargeable with contributory negligence in using it, unless there has not been time enough to repair it, and it is obviously dangerous.²⁷

24. *Anderson v. Scholey*, 114 Ind. 553.

25. *Matthieson v. The Railway*, 125 Iowa, 90, 100 N. W. Rep. 51.

26. *White v. Navigation Co.*, 36 Wash. 281, 78 Pac. Rep. 909.

27. *Pennsylvania Co. v. Marion*, 123 Ind. 415. Said the court: "Railway companies are common carriers; they owe a duty to the public, and the public has a right to rely upon its performance. The fact that a person may have seen a platform out of repair at one time does not bind him to carry such defect in mind upon all future occasions when approaching or leaving a train at that point. The platform is in constant use by the employees of the company. They are bound to take notice of

its condition. The presumption is, not that such defect will be allowed to remain, but that the company will discharge its duty to the public and repair the defect. If the defect were such as would naturally suggest to one of common understanding that it was dangerous, and place one in peril to pass over it to and from a train, and with such knowledge one voluntarily steps upon it, or having knowledge of such defect within such a short space of time previous that the company could not reasonably be expected to have repaired it, under such circumstances one may be regarded as not having used ordinary care, and having recklessly entered upon it at his own risk; but we

But if the passenger voluntarily makes use of a platform which he knows to be dangerous or defective, he must exercise a degree of care for his safety proportionate to the risk arising from its known or obvious condition, and, for a failure to do so, he will be precluded from the right to recover for any resulting injury.²⁸ Thus in *Waterbury v. The Railroad*,²⁹ it appeared that the plaintiff, while lawfully upon the defendant's platform, with knowledge that on one portion of it there had formed an accumulation of ice which had been caused by water dripping from the roof of the depot, began stepping backward without looking behind him until he stepped upon the ice. In doing so, he slipped, fell, and sustained injury. It was held that under the circumstances he had failed to exercise ordinary care for his own safety, and that no recovery could therefore be had.

Sec. 1208. Occupying exposed position upon railway company's premises.—Where the railway company has provided reasonably safe places upon its premises for the accommodation of its passengers, it will have performed its duty in such respect. A passenger, therefore, who voluntarily and unnecessarily leaves the place thus provided for him and assumes a position which is obviously dangerous will be deemed to have acted negligently, and, if in consequence he receive an injury, no recovery can be had. Thus, if he voluntarily and without

have no such case as that under consideration. The railroad company stands in the position of saying to the public, 'our platform is safe, and though it is not in such repair as the company is required to keep it, yet it is in common use by the public,' and being so held out by the company, and used by the public, the appellee was not bound to abandon its use and seek some other way of entering and leaving the cars; and if, in using it, as he is invited to do by the company, he exercises proper care

proportioned to the apparent condition of the platform in leaving the train, and is injured by reason of the defects, we do not think it can be said that he is guilty of contributory negligence; and cannot recover for the injury sustained by reason of the negligence of the company."

28. *Houston, etc., Ry. Co. v. McCarty*, — Tex. Civ. App. —, 89 S. W. Rep. 805.

29. 104 Iowa, 32, 73 N. W. Rep. 341.

Where the platform of the de-

a necessity for so doing leaves the platform of the depot and takes a position near railway tracks along which trains are likely to pass, he cannot recover for an injury received from being struck by a passing train, unless the servants of the company knew or ought to have known of his situation and failed to exercise reasonable care to avoid injuring him.³⁰ In *Conroy v. The Railway*,³¹ it appeared that the train upon which the plaintiff was a passenger was stopped between stations because of a wrecked freight train obstructing the track. The plaintiff was required by the agent in charge of the train on which he was riding to leave it and pass around the wreck to another point on the track to there await for another train which would carry him on his journey. A part of the wrecked freight train consisted of metal tanks filled with naphtha and kerosene which had taken fire and was burning with great violence. After arriving at the place where he was to await the other train, the plaintiff, with several fellow passengers, approached to a point some distance nearer the wreck where a better view of the burning tanks could be obtained. While standing in such position, an explosion took place causing quantities of burning oil to be thrown upon the plaintiff which resulted in the injury for which he sought to recover damages. It was contended that the railway company had been guilty of negligence in failing to warn him of the danger, and in allowing him to assume such an unsafe position. But it was held that, while it was the company's duty to have seasonably warned the passenger, when reasonably necessary, of any existing or apprehended danger, it was also the passenger's duty to observe ordinary care and caution to protect himself from such danger;

pot is obstructed by lumber, and the passenger, with knowledge of its presence upon the platform, thoughtlessly stumbles upon it and is injured, he cannot recover. *Wood v. The Railroad*, 100 Ala. 660, 13 So. Rep. 552.

30. *Holmes v. The Railway*, 97 Cal. 161, 31 Pac. Rep. 834; *McGeehan v. The Railroad*, 149 Penn.

St. 188, 24 Atl. Rep. 205; *Railway Co. v. Bolton*, 2 Ind. Terr. 463, 51 S. W. Rep. 1085.

31. 96 Wis. 243, 70 N. W. Rep. 486, 38 L. R. A. 419. To same effect see, *Railway Co. v. Myers*, 80 Fed. 361, 25 C. C. A. 486; *Smith v. Day*, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108.

that in voluntarily approaching so near the burning tanks, he had failed to do so, and was therefore without remedy.

Sec. 1209. (§ 655.) Exposure of person—Passenger projecting his limbs from car window.—The question whether or not permitting the limbs to protrude out of the window of the car while the train is in motion would, as a matter of law, be such incautious or imprudent conduct on the part of the passenger as would deprive him of the right to a recovery if he were to sustain an injury which, but for such conduct, would not have happened has been several times before the courts, and conclusions which are impossible to reconcile have been reached. The weight of authority, however, seems to sustain the view that the protrusion of the limbs of the passenger, even to the minutest distance, out of the windows of the car, will be regarded as necessarily and under all circumstances such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in not providing against the occurrence of such accidents.¹ In the case of *Laing v. Colder*,²

1. *Louisville, etc., R. R. v. Sickings*, 5 Bush, 1; *Indianapolis, etc., R. R. v. Rutherford*, 29 Ind. 82; *Pittsburg, etc., R. R. v. McClurg*, *post*; *Pittsburg, etc., R. R. v. Andrews*, 39 Md. 329; *Favre v. Railroad Co.*, 13 Ky. L. R. 116, 16 S. W. Rep. 370; *Holbrook v. The Railroad*, 12 N. Y. 236; *Georgia, etc., Ry. Co. v. Underwood*, 90 Ala. 49, 8 So. Rep. 116; *Clark's Adm'x v. The Railroad*, 101 Ky. 34, 39 S. W. Rep. 840, 36 L. R. A. 123; *Carrico v. The Railway*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; *s. c.* 35 W. Va. 389, 14 S. E. Rep. 12; *Railroad Co. v. Scott*, 88 Va. 958, 14 S. E. Rep. 763, 16 L. R. A. 91; *Railway Co. v. Sims*, 28 Ind. App. 544, 63 N. E. Rep. 485; *Railroad*

Co. v. Roeser, — Neb. —, 95 N. W. Rep. 68.

The protrusion of the limbs of the passenger, even to the minutest degree, out of the window of the car will be regarded as necessarily and under all circumstances such contributory negligence on part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however incautious the latter may have been in guarding against such accidents. *Railroad v. Scott*, 88 Va. 958, 14 S. E. Rep. 763, 16 L. R. A. 91.

Where, however, the passenger's arm is thrust through the car window by a lurch of the train, and

the arm of the passenger was broken whilst he was traveling in a railroad car. The accident occurred while the train was passing over a bridge which was so narrow that the plaintiff's hand, lying outside of the car window, was caught by the bridge, and his arm was broken. The question for the jury, as said, was, whether the hurt suffered was ascribable to the negligence of the defendant's agents, or to the laches of the plaintiff himself; and this was considered as depending upon the inquiry whether warning had been given to plaintiff of the danger by the agents of the company. It was thus virtually conceded that merely suffering his hand to protrude from the window was not necessarily negligence on the part of the plaintiff. So in the case of *The New Jersey Railroad v. Kennard*,³ Gibson, J., instructed the jury at the *nisi prius* trial that where the passenger was injured by having his arm, which was projecting outside of the window, broken by coming in contact with the post of a bridge, the company was liable for the injury. It was proven that no such injury had ever occurred from the same cause before, though the cars had sometimes struck against the post; and the material question was considered to be whether the defendants were obliged so to construct their cars with slats, bars, or other barricades at the windows as to prevent passengers from putting out their arms, and whether the defendants were not liable in consequence of having failed to do so. "A carrier of passengers," said the court, "is bound to omit no precaution that may conduce to their safety. He is bound to guard beforehand against every apparent danger that may beset them. The dangers incident to traveling in railway cars are few in comparison with those incident to other modes of travel; but among the most prominent of them is the risk of injury to limbs stuck out of the

it strikes against an obstruction which the company has negligently permitted to remain in dangerous proximity to the track and is thereby injured, he will not be guilty of contributory negligence and the railroad company will be liable. *Railroad Co. v. Jacoby*, 14 Ky. Law Rep. 763.
2. 8 Penn. St. 479.
3. 21 Penn. St. 203.

windows, where the cars are not constructed so as to prevent it. Anyone who has traveled by railway must have observed that even the most careful passengers forget the risk and unconsciously suffer their elbows to slip out beyond the window sill. . . . Nor are all the duties of the carrier to his passenger performed when the conductor puts him into the car and leaves him to shift for himself. He is bound to guard him from every danger which extreme vigilance can prevent. The passenger has put his life into his hands, and the carrier is bound to defend it as his own. In the present case, it would seem that every precaution was neglected, inasmuch as there was neither a properly constructed car, nor a verbal warning of danger, nor even the miserable and insufficient substitute, a written caution." And upon appeal this charge was approved; but it was said that the language of the learned judge who presided at the trial seemed too broad as a general principle, when he said that no car is good if the windows are not so constructed as to prevent passengers from putting their limbs through them, but that in its application to a road which in some places is so narrow as to endanger projecting limbs, the instruction was proper.

But in the subsequent case of *The Pittsburg, etc., R. R. v. McClurg*,⁴ which arose in the same court in which the two pre-

4. 56 Penn. St. 294.

In *Georgia, etc., Ry. Co. v. Underwood*, 90 Ala. 49, 8 S. Rep. 116, McClellan, J., in speaking of this question says: "The following authorities hold that it is negligence *per se*, and to be so declared by the courts as a matter of law, for a passenger on a steam railway to protrude his arm, hand and elbow through the window of a car, while in motion, and beyond the outer edge of the window or outer surface of the car; and that a recovery cannot be had for any injury which but for such negligence would not have been sustained.

Dun v. Railroad Co., 78 Va. 645, 16 Am. & Eng. R. Cas. 363; *Railroad Co. v. McClurg*, 56 Pa. St. 294; *Morel v. Insurance Co.*, 4 Bush, 536; *Railroad Co. v. Sickings*, 5 Bush, 1; *Barton v. Railroad Co.*, 52 Mo. 253; *Railroad Co. v. Rutherford*, 29 Ind. 82; *Railroad Co. v. Andrews*, 39 Md. 329; *Todd v. Railroad Co.*, 3 Allen, 18, 7 Allen, 207; *Holbrook v. Railroad Co.*, 12 N. Y. 236, 244. . . . "The doctrine of the authorities cited, is approved by text-writers of recognized accuracy and learning. Thus it is said in 2 *Shear. & R. Neg.* § 519, that 'it is deemed contribu-

ceding cases were decided, the Kennard case was expressly disapproved, and it was held that the thoughtless or imprudent protrusion of the elbow from the window of the car was negligence *in se*, which would exempt the company from all liabil-

tory negligence, within the rule, for a passenger to do any voluntary act which unnecessarily exposes him to risk of such injuries as a traveler is liable to. A passenger cannot, therefore, recover (as a general rule) for an injury to his arm or head, while improperly projecting out of a window of a railroad car or stage.' And Mr. Beach states the doctrine as formulated in *Railroad Co. v. McClurg*, *supra*, to the effect that, as a 'general rule, a passenger who puts his head or elbow or any other part of his body out of the window of the car in which he is riding, has no cause of action against the railroad company for any injury that he may sustain on that account, from contact with outside obstacles or forces. If any part of the passenger's body extends through the open window, beyond the place where the sash would be when the window is shut, it is sufficient to prevent a recovery of damages by him;' and with respect to the contrary position taken by the supreme court of Wisconsin, he observes: 'A consideration of the cases to be cited in support of this view will show that there is but a slight basis for it, and that the weight of authority is decidedly against any such position.' Beach, Contrib. Neg. 104, 160, 167. Bishop recognizes the same doctrine (*Bish. Non-cont. Law*, § 1107); and Mr. Wharton, while expressing the same doubts

as to the correctness of the rule to the extent it has gone, yet in effect admits that it has the support of the weight of authority. Whart. Neg. § 361. This question is an open one in Alabama. We are, however, satisfied with the rule as formulated and supported by the great number of adjudged cases, and the texts to which we have referred. The reasons upon which they base their doctrine appear to be eminently sound. Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort require that he should do so. It may be, doubtless is, true that men of ordinary prudence and care habitually lean upon or rest their arms upon the sills of windows by which they ride. But this is a very different thing from protrusion beyond the outer edge of the sills and beyond the surface of the car. We cannot concur in the assumption of the Wisconsin court that prudent men are habitually given to thus projecting themselves from the windows of moving trains. Judge Thompson, who evinces an inclination to agree with that court, fails to indorse

ity, although the hurt was produced by the passenger's arm coming in contact with a car standing on a switch on defendant's road. "A passenger on entering a railroad car," said Thompson, C. J., "is to be presumed to know the use of a seat and the use of a window; that the former is to sit in and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy, but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so to be pronounced by the court."

this assumption as to the habits of prudent men, which is the keystone to the position announced by it. He says: 'It is perhaps not too strong a statement that no person ever traveled on a railroad train without at some time resting his arm on the window sill, at least, if not permitting it to protrude slightly. Conduct which is universal is necessarily that of persons reasonably prudent.' Thomp. Carr. 258. But the conduct which is assumed by him to be universal is that of resting the arm on the sill, not permitting it to protrude, even slightly, beyond.

The former, prudent men may do; but we cannot conceive that the latter is an act of which a man of reasonable care and prudence would ever voluntarily do, much less that it is the habit of such men to so act. The former, under ordinary circumstances, is not negligence; the latter, according to the overwhelming preponderance of authority, based on sound reason, as we conceive, standing by itself, is always negligence *per se* which will defeat a recovery for any injury to which it proximately contributed."

Sec. 1210. (§ 656.) Same subject—Such protrusion held negligence.—In *Todd v. The Railroad*,⁵ where the action was against a railway company to recover damages for a personal injury, caused by the swinging of an unfastened door of another car, standing upon a track parallel to that over which the passenger was passing, against the elbow of the passenger, extended through an open window, it was held that there was no liability upon the part of the company. “Looking at the mode in which railroads are constructed,” said the court, “with posts and barriers, which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person traveling on a railroad is exercising reasonable care in placing his arm in such a position that it protrudes from a window and may come in contact with external obstructions.” It was therefore held that if the passenger’s elbow extended through the open window beyond the place where the sash would have been if the window had been shut, it was the duty of the court to rule that it was such carelessness as to prevent a recovery of damages by him.

So in *Clark’s Adm’x v. The Railroad*,⁶ it appeared that the passenger, while sitting near an open window, raised his arm for the purpose of placing his eye-glasses in his pocket, and that in doing so he protruded his elbow slightly beyond the outer surface of the car. The train was passing at the time through a tunnel, and his elbow came in contact with an upright timber which had been placed in such a position that it barely cleared the side of the car. The injury inflicted later resulted in his death. “We cannot furnish any rule,” said the court, “by which to measure the distance a passenger may protrude his arm before it may be said that he is guilty of

5. 3 Allen, 18, 7 *id.* 207.

6. 101 Ky. 34, 39 S. W. Rep. 840,
36 L. R. A. 123.

negligence. It is the fact that he does so without any qualifying circumstances impelling him, not the distance so protruded, that constitutes the negligence." It was held, therefore, that although the extent of the protrusion was not more than an inch and a half, his act was negligence *in se* and the company was not liable.

Sec. 1211. (§ 657.) Same subject—The contrary view.—But in the case of *Spencer v. The Railroad*,⁷ the supreme court of Wisconsin came to the same conclusion to which the Pennsylvania judges had come in the *Kennard* case previously referred to, and the decision in *Todd v. The Railroad*⁸ was said to be contrary to the weight of authority, and unsound in principle. "For, as already observed," said Cole, J., "it seems to us almost absurd to say, in every case, that a party who exposes his arm in the least degree outside of the car window is wanting in proper care and attention, and that this is a presumption of law which is to control the judgment of the court and jury, regardless of other facts and circumstances;" and this is held to be the sounder view, and more in harmony with the analogies of the law, and the case of *Kennard* to be the better considered, and entitled to more weight, by the supreme court of Illinois.⁹

So in the case of *Kird v. The Railway*,¹⁰ a female passenger, while sitting beside an open window of a railway car with her arm resting for comfort on the sill of the window, permitted her elbow to extend beyond the outer surface of the car to a distance of about the thickness of the arm. As the train was passing a depot platform her elbow came into collision with a bale of cotton which the company had allowed to remain in such a position on the platform that it barely cleared the side of the car, and, as a result, her arm was broken. Provosty, J., after deciding that it was the grossest negligence on the part

7. 17 Wis. 487.

8. 3 Allen, 18, 7 *id.* 207.

9. *Chicago, etc., R. R. v. Pondrom*, 51 Ill. 333.

10. 109 La. 525, 33 So. Rep. 587, 94 Am. St. Rep. 452, 60 L. R. A. 727; *s. c.* 105 La. 226, 29 So. Rep. 729.

of the railway company to permit the bale of cotton to remain so near the edge of the platform, on the question of the passenger's contributory negligence, said: "Doubtless passengers should keep their persons within the car; there is abundant room for them to do so, and there is no necessity for them to stick their elbows outside; but the fact of the matter is that railway companies so construct their cars that the window sill at the passenger's side offers an inviting support to the arm, and in warm weather when the sash is up, allures the arm to stretch along its airy surface, and notoriously passengers do yield to the temptation, and almost habitually do rest their elbows on the window sills, even at the risk of some part protruding beyond the line of the car. We do not think that an elbow protruding slightly under these circumstances *ipso facto* forfeits the protection of the law, and becomes free game to the negligence of the railway company. We think that the passenger has the right to rely upon there being a clearance space for the train of at least the thickness of the arm, and that the question whether the exposure of the arm to that extent shall constitute contributory negligence must be left to be decided according to the circumstances of each particular case."

Sec. 1212. (§ 658.) Same subject.—To the same effect is the case of *Clerc v. The Railroad*.¹¹ It there appeared that the passenger's elbow, while projecting beyond the sill of the car window, was injured by being struck by the open side door of a freight car which the railroad company had left at rest upon a switch connecting with the main track, and in such a position that the open door closed the space between the switch and the main track. It was held that it was not necessarily a negligent act for the passenger to permit his elbow to project beyond the outer line of the car, and that it was a question to be determined from all the circumstances whether the act was such negligence as would bar a recovery. So in *McCord v.*

11. 107 La. 370, 31 So. Rep. 886, 90 Am. St. Rep. 319.

The Railroad,¹² it was held that the mere fact that the passenger extends his arm a distance of four or five inches beyond the outer surface of the car will not, of itself, preclude him from the right to a recovery if his arm is struck by some obstruction and injured.¹³

Sec. 1213. (§ 659.) Same subject.—The cases which adopt the rule that an injury sustained by the passenger by using the window of a car in which he was riding as a resting place for his arm, and suffering it to project beyond the plane of the side of the car, is not the fault of the carrier, seem to lose sight of that rule of extraordinary diligence required of him to secure his passenger against harm. Unquestionably, so far as others are concerned, the railway company may construct and manage its road and its trains as it pleases, except upon public thoroughfares and at the crossings of public highways, and no one who is a mere stranger can complain that he has sustained injury by its neglect to provide safeguards against probable danger. But its duty to the passenger is a wholly different thing. It is bound to make reasonable provision for his comfort, and at the same time exercise the greatest diligence for his safety. The carrier must not only shield him from danger when it is upon him, as far as it can be done, but it must anticipate it, if possible, and warn him of its approach. It is true that it has provided the seat to sit in, and the window to give air and light, but it has at the same time so placed them in reference to each other, that it is almost as natural for the passenger to rest his arm upon the latter as it is to breathe the air which it lets in; and to say that the carrier must have no consideration for the accidental or thoughtless exposure which may result, and, without regard to such probable accidents, can be required to leave only the smallest possible space between passing trains, or between its cars and the post of a bridge over which they must pass, would seem inconsistent with that

12. 134 N. Car. 53, 45 S. E. Rep. 1031, citing *Hutchinson on Carr.* preclude him from a recovery. *Railway Co. v. Danshank*, 6 Tex. Civ.

13. The mere fact that the passenger protrudes his arm outside of the car window will not in law App. 385, 25 S. W. Rep. 295. See also, *Goller v. Railroad Co.*, 96 N. Y. Supp. 483.

rule of extreme caution which it is required to use in providing in other respects for the safety of the passenger.¹⁴

Sec. 1214. (§ 659a.) Same subject—No defense where it does not contribute to injury.—But whatever view may prevail, the fact that the passenger's arm projects beyond the outer surface of the car cannot defeat a recovery where, if otherwise negligence, it in no way contributes to the injury in question.¹⁵

Sec. 1215. Same subject—Protruding head through car window.—While, as has been seen, the decisions are not in harmony on the question whether it is *per se* a negligent act on the part of the passenger to protrude any part of his arm through the open window of a moving railway car, there would seem to be no question but that the passenger who deliberately protrudes his head beyond the outer surface of the car while the train is in motion would, in doing so, be chargeable with negligence as a matter of law, and would be debarred from the right to a recovery if injury were thereby occasioned him.¹⁶ In the case of *The Railroad Co. v. Roeser*,¹⁷ the passenger protruded his head through an open window of the car in which he was riding for the purpose of greeting a friend. While doing so he was struck above the left ear by an iron ring which was suspended from a crane for the purpose of holding mail sacks, and the injury received resulted in his

14. This section has been left as the learned author wrote it.

15. *Moakler v. The Railway*, 18 Ore. 189.

16. *Benedict v. The Railroad*, 86 Minn. 224, 90 N. W. Rep. 360, 91 Am. St. Rep. 345, 57 L. R. A. 639; *Knauss v. The Railroad*, 29 Ind. App. 216, 64 N. E. Rep. 95; *Shelton's Adm'r v. The Railroad*, 19 Ky. Law Rep. 215, 39 S. W. Rep. 842. (In this case the passenger was irresistibly compelled to vomit, and, in a half fainting condition, rushed to an open window and protruded his head through

the window. His head was instantly struck by an upright timber in the tunnel through which the train was passing, the blow resulting in death. It was held that the railroad company was not liable.)

But see *Gulf, etc., Ry. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. Rep. 793, which holds that the question of the passenger's negligence in protruding his head through the car window is one of fact for the jury.

17. — *Neb. —*, 95 N. W. Rep. 68.

death. "It is known to every person of ordinary intelligence," said the court, "that on account of passing trains on adjacent tracks, and other causes continually existing in the operation of the road, a slight extension of the human body beyond the side of a moving car is done with danger to life and limb. These conditions have always existed. They are customary and to a large extent indispensable. The customary methods of constructing tracks, building bridges, and other appliances, and running trains in railroad yards render any exposure of a person beyond the car-line imminently hazardous." It was held that the conduct of the passenger in protruding his head through the window of the car was such negligence as would defeat a recovery.

Sec. 1216. (§ 660.) Whether standing in car be contributory negligence.—The question has arisen in a number of cases whether the fact that the passenger upon a railway car was not in his seat, but was standing at the time of an accident resulting in injury to him from which he would have escaped had he been in his seat, can be imputed to him as such contributory negligence as to deprive him of the right to recover from the company for the injury. As a general rule, the passenger is under no duty to remain constantly in his seat, though the train be in motion, and in the absence of other facts tending to show that he acted imprudently, it would be proper for the court as a matter of law to declare that his act in standing in the car when an injury was received by him would not be negligence. In *Wylde v. The Railroad*,¹ the passenger arose from

1. 53 N. Y. 156. See also, *Willis v. The Railroad*, 34 N. Y. 670.

The passenger, while traveling upon a railway car, cannot be expected to remain constantly in his seat. He may leave it for any reasonable purpose, and if he receive an injury by reason of the negligence of the railway company, the mere fact alone that at the time of the injury he was not in his

seat will be no defense to an action for such injury. *Sturdivant v. The Railway* (Tex. Civ. App.), 27 S. W. Rep. 170.

A passenger has the right, while on his journey, to go from his seat to the water-closet of the car in which he is riding, and while so going, to be protected against being thrown out through an open doorway by conditions within the

his seat to button his coat, preparatory to leaving the car, the train having reached its destination, though still in motion. The locomotive being detached, the cars were permitted to move on through the depot, and struck, with great force, a "bumper," the shock thus occasioned throwing the plaintiff down and injuring him. "There is no ground," said the court, "for imputing negligence to the plaintiff. It is probable that if he had retained his seat the injury would not have happened. He had no notice of danger, and had a right to assume that the train would be stopped in the usual manner. The train had reached its destination, and the plaintiff left his seat with a view of leaving the car as soon as the train stopped. He did as passengers usually do, and what the company must have known they were accustomed to do, and the plaintiff could not have supposed that the act was inconsistent with safety." It was therefore held, as a matter of law, that the position in which he had placed himself at the time of the accident was not negligence in him. So in the case of *Gee v. The Railway*,² both the queen's bench and the exchequer chamber of England held that there was nothing improper or negligent in the act of the passenger in standing up to look through the window of the car. "Assuming that the company had done their duty," said Cockburn, C. J., "the passenger did nothing more than that which came within the scope of his enjoyment while trav-

control of the company. *Lavis v. The Railroad*, 54 Ill. App. 636.

The question whether the passenger is chargeable with negligence in standing in a railway car while the train is in motion is ordinarily one of fact for the jury to determine in view of all the attending circumstances. But it should first be determined by the court whether the facts shown are sufficient to make an issue. There are usually special circumstances surrounding the act of the passenger in standing in the car. If

such circumstances fairly admit of question whether the act was negligent, a case is made for the jury; but if they leave no doubt and suggest no question of the kind, there would be nothing for the jury to determine. *Railway Co. v. Bell*, 93 Tex. 632, 57 S. W. Rep. 939.

2. L. R. 8 Q. B. 161. See also, *Romine v. The Railroad*, 24 Ind. App. 230, 56 N. E. Rep. 245, following and approving *Gee v. The Railway*, *supra*.

eling, without committing any imprudence. In passing through a beautiful country, he certainly is at liberty to stand up and look at the view, not in a negligent, but in the ordinary manner of people traveling for pleasure. Here the defendant was simply looking at the signal lights, and there was nothing in his conduct which can be imputed to him as negligence or imprudence." The judgment for the plaintiff was therefore affirmed, a majority of the judges expressing the opinion that there was no proof of impropriety in the conduct of the plaintiff to justify the submission of the case to the jury upon the question of contributory negligence. So it is not contributory negligence for a passenger to stand in a crowded street-car without objection from the conductor,³ nor for a woman standing in a crowded street-car to fail to hold on by the overhead straps where by ordinary convenience she cannot reach and support herself by them.⁴

Where, however, the circumstances surrounding and characterizing the act of the passenger in standing in the car are such that, in view of them, reasonable minds might fairly arrive at different conclusions as to whether the passenger, in not remaining in his seat, had acted imprudently, the question of his contributory negligence would properly be for the jury.⁵

Sec. 1217. (§ 660a.) Same subject—Care to be exercised by passenger while riding on freight trains.—It is a matter of

3. *Lapointe v. The Railroad*, 144 Mass. 18.

4. *Whipple v. The Railway*, 11 Phila. 345.

5. *Railway Co. v. Bell*, 93 Tex. 632, 57 S. W. Rep. 939.

Standing in the aisle of a passenger car is not negligence as a matter of law; whether it is negligence or not is ordinarily a question for the jury. *Lane v. The Railway*, 21 Wash. 119, 57 Pac. Rep. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; *Railroad Co. v. Sandusky*, 14 Ky. Law Rep. 767; Rail-

way Co. *v. Topping*, 25 Ky. Law Rep. 1390, 78 S. W. Rep. 135; *Railroad Co. v. Jolly*, 25 Ky. Law Rep. 1735, 78 S. W. Rep. 476.

In *Barden v. The Railroad*, 121 Mass. 426, the train on which the plaintiff was traveling having arrived at his destination, and he having risen from his seat to prepare to leave the car, when a collision occurred, it was held that, whether he was wanting in care in leaving his seat and standing in the passage-way after the name of the station had been announced,

common knowledge that riding upon freight trains is unavoidably accompanied with more delay, discomfort and danger than upon trains which are devoted exclusively to the carriage of passengers. The passenger, therefore, who accepts carriage upon a freight train must be deemed to thereby assume those risks which are ordinarily incident to its proper management.⁶ He will be presumed to understand that different cars, couplings and brakes are used, and that cars must be coupled, uncoupled and shifted in the course of yard work at various stations; that jars and jolts and concussions are incident to the ordinary management of the cars, and that such jars and jolts affect the equilibrium of persons who stand within the cars.⁷ The court,

for the purpose of hastening his departure from the car, was a question of fact for the jury.

It certainly would not be contributory negligence to stand in a crowded excursion car, nor is the passenger presumed to know that there are vacant seats in other cars. If such be the case it is the duty of the train officials to inform the passenger of such fact. *Farnon v. The Railroad*, 180 Mass. 212, 62 N. E. Rep. 254.

It is not negligence *per se* for a passenger to leave his seat and pass to another part of the car. But if it should appear that he incurred additional risk of injury by leaving his seat, or, if he should select a time for so doing when there was necessarily increased violence in the movement of the car, he would be under the duty to use such care for his safety as a prudent person would use under like circumstances, and for a failure to do so, he would be chargeable with contributory negligence. *Burr v. The Railroad*, 64 N. J. Law 30, 44 Atl. Rep. 845.

6. *Railroad Co. v. Ashley*, 67

Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375; *Reber v. Bond*, 38 Fed. 822; *Railway Co. v. Crowder*, 135 Ala. 417, 33 So. Rep. 335; *Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. Rep. 979; *Crine v. Railway Co.*, 84 Ga. 651; *Railroad Co. v. Vinson*, 25 Ky. L. Rep. 652, 76 S. W. Rep. 167; *s. c.* 25 Ky. L. R. 38, 74 S. W. Rep. 671; *Railway Co. v. Watson's Adm'r*, 93 Ky. 645, 21 S. W. Rep. 244, 19 L. R. A. 310, 40 Am. St. Rep. 211; *Olds v. Railroad Co.*, 172 Mass. 73, 51 N. E. Rep. 450; *Heyward v. Railroad Co.*, 169 Mass. 466, 48 N. E. Rep. 773; *Moore v. Railroad Co.*, 115 Mich. 103, 72 N. W. Rep. 1112; *Symonds v. Railroad Co.*, 87 Minn. 408, 92 N. W. Rep. 409; *Schilling v. Railroad Co.*, 66 Minn. 252, 68 N. W. Rep. 1083; *Harris v. Railway Co.*, 89 Mo. 233; *Erwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. Rep. 88; *Railway Co. v. Crow*, 47 Neb. 84, 66 N. W. Rep. 21; *Felton v. Horner*, 97 Tenn. 579, 37 S. W. Rep. 696; *Mullen v. Railway Co.*, — Tex. Civ. App. —, 92 S. W. Rep. 1000.

7. *Railway Co. v. Crowder*, 130 Ala. 256, 30 So. Rep. 592; *Moore*

it is said, will take judicial notice that it is difficult, if not impossible, to handle trains of varying lengths and weights upon roads of varying grades without concussions, and the passenger will be expected to know this and will be held to assume the risks which are incident to such methods of operation.⁸ This being true, the duty devolves upon the passenger by freight train to exercise for his safety a degree of care commensurate with the increased dangers which are ordinarily incident to the proper management of such a train; and for any failure on his part to do so, whereby an injury is suffered, he will be precluded from the right to a recovery. Thus it has been held that the conduct of the passenger in sitting upon the arm of a seat,⁹ or in sitting tilted back in a chair near an open door instead of upon a seat,¹⁰ or in lying down in a seat in such a way that his head is likely to be bumped against the framework or that he is likely to be thrown from the seat,¹¹ will be such evidence of contributory negligence on his part as will bar him from the right to recover for any consequent injury. So where a passenger by freight train entered the caboose with knowledge that the crew was still engaged in switching the train, and sat down in a chair which was intended for the use of the conductor instead of

v. Railroad Co., 115 Mich. 103, 72 N. W. Rep. 1112, citing *Hutch. on Carr.*; *Symonds v. Railway Co.*, 87 Minn. 408, 92 N. W. Rep. 409; *Wait v. Railroad Co.*, 165 Mo. 612, 65 S. W. Rep. 1028.

8. *Moore v. Railroad Co.*, 115 Mich. 103, 72 N. W. Rep. 1112.

That the passenger assumes the risks attendant upon ordinary jerks or concussions and in order to hold the railroad company liable must prove that he was injured by an unusual or extraordinary jerk or jolt, see the following cases: *Frohriep v. Railway Co.*, 131 Mich. 459, 91 N. W. Rep. 748; *Neville v. Railway Co.*, 158

Mo. 293, 59 S. W. Rep. 123; *Young v. Railway Co.*, — Mo. App. —. 84 S. W. Rep. 175; *Erwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. Rep. 88; *Railroad Co. v. Humphrey*, 83 Miss. 721, 36 So. Rep. 154; *Steele v. Railway Co.*, 55 S. Car. 389, 33 S. E. Rep. 509, 74 Am. St. Rep. 756.

9. *Smith v. Railroad Co.*, 99 N. C. 241.

10. *Norfolk, etc., R. Co. v. Ferguson*, 79 Va. 241; *Freeman v. Railroad*, 131 Mich. 544, 91 N. W. Rep. 1021, 100 Am. St. Rep. 621.

11. *Erwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. Rep. 88.

taking one of the regular seats provided for passengers, it was held that in doing so he had failed to exercise ordinary care for his safety, and that he was not entitled to recover for an injury sustained by being thrown from the chair by a jolt of the car.¹²

The question of the contributory negligence of the passenger by freight train most frequently arises, perhaps, in those cases where an injury has been received by the passenger while standing within the car. To do so unnecessarily will bar the passenger from the right to a recovery if an injury is received which but for such conduct would not have happened.¹³ But this does not mean that it is negligence *per se* to ride standing in a freight car, for circumstances often arise in which the passenger may be justified in so doing. Each case must therefore be judged on its own particular facts.¹⁴ Thus, where a passenger while riding in the caboose attached to a freight train arose from his seat and leaned forward for the purpose of spitting in a stove, and was injured by a sudden jerk of the cars, it was held that his act in leaving the seat was not *per se*

12. *Freeman v. The Railroad*, 131 Mich. 544, 91 N. W. Rep. 1021, 100 Am. St. Rep. 621.

13. *Wallace v. Railroad Co.*, 98 N. C. 494; *Harris v. Railway Co.*, 89 Mo. 233; *Shamblin v. Railroad Co.*, 114 La. 467, 38 So. Rep. 421; *Krumm v. Railway Co.*, 71 Ark. 590, 76 S. W. Rep. 1075; *Young v. Railroad Co.*, — Mo. App. —, 84 S. W. Rep. 175.

It is contributory negligence for a crippled woman to leave her seat to obtain a drink of water while the train is switching. *Felton v. Horner*, 97 Tenn. 579, 37 S. W. Rep. 696.

14. A passenger on a freight train who leaves her seat to get a drink of water for her child is not, as a matter of law, guilty of contributory negligence. *Railroad Co. v. Masterson*, 16 Ind. App. 323, 44 N. E. Rep. 1004.

It is not contributory negligence for a passenger to remain standing up, the seats being full, in the car of a mixed train. *Holland v. Railroad Co.*, 105 Mo. App. 117, 79 S. W. Rep. 508.

It cannot be said, as a matter of law, that a passenger on a mixed freight and passenger train is guilty of contributory negligence in rising from his seat and moving towards the door after the name of his station is called. *Newton v. Railroad Co.*, 30 N. Y. Supp. 488, 80 Hun, 491. Compare *Young v. Railway Co.*, — Mo. App. —, 84 S. W. Rep. 175.

For a child to stand by her mother while the latter is making a bed for her to lie on, is not such negligence as to warrant setting aside the verdict of a jury in its favor. *Railroad Co. v. Axley*, 47 Ill. App. 307.

negligence, and that the question whether in so doing he had exercised due care for his safety was one of fact for the jury.¹⁵

Sec. 1218. (§ 661.) Riding upon engine.—Riding upon the engine of a railway company is certainly attended with more peril than riding in the car provided for passengers. A person, therefore, who unnecessarily rides upon the engine, although invited to do so by the engineer or fireman, will be debarred from the right to a recovery for any injury which he may thereby sustain.¹⁶ Nor will the fact that the conductor had knowledge of his presence upon the engine, and acquiesced in his riding in such a place, afford him any excuse for such incautious conduct.¹⁷ Where the plaintiff got upon the engine by the permission of the engineer, and, while there, was injured by an accident caused by the negligence of the employees of the company, it was held that he was a wrong-doer from the time he stepped his foot upon the engine, and so continued un-

15. *Railroad Co. v. Burrows*, 62 Kan. 89, 61 Pac. Rep. 439. See also, *Sprague v. Railway Co.*, 92 Fed. 59, 34 C. C. A. 207; *Railroad Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375; *Railroad Co. v. Humphrey*, 83 Miss. 721, 36 So. Rep. 154 (standing in car); *Railway Co. v. Adams*, 32 Tex. Civ. App. 112, 72 S. W. Rep. 81 (standing in car).

Where a person is lawfully riding upon a lumber car, the fact that it is more dangerous to ride upon such a car will not be sufficient to charge him with contributory negligence. *Trinity, etc., R. Co. v. Stewart*, 2 Tex. Ct. Rep. 498, 62 S. W. Rep. 1085.

16. *Files v. The Railroad*, 149 Mass. 204; *Radley v. The Railway*, 44 Or. 332, 75 Pac. Rep. 212; *Distler v. The Railroad*, 151 N. Y. 424, 45 N. E. Rep. 937, 35 L. R. A. 762; *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427.

A person who rides upon the engine cannot recover for an injury received while so riding, unless it be wantonly inflicted by the company's employees. *Railroad Co. v. Boyle*, 101 Tenn. 40, 46 S. W. Rep. 760.

A brakeman has no authority to invite one to ride upon the engine. *Stringer v. The Railway*, 96 Mo. 299.

A person who rides upon the engine of a freight train by an agreement with the fireman to shovel coal for the privilege of riding thereon, is not a passenger, and the company will not be liable if he is injured, although such injury was occasioned by its negligence. *Woolsey v. The Railroad*, 39 Neb. 798, 58 N. W. Rep. 444, 25 L. R. A. 79.

17. *Radley v. The Railway*, 44 Or. 332, 75 Pac. Rep. 212; *Railway Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. Rep. 1086.

til he was injured, and that he could not recover for the injury. The consent of the engineer, it was said, was wholly unauthorized, and conferred no legal right upon the plaintiff to ride upon the engine.¹⁸ So it will be equally negligent in a person to ride upon the tender of the engine,¹⁹ or upon the footboard attached thereto,²⁰ and if, while so riding, he receives an injury, he will be without remedy.

Sec. 1219. (§ 661a.) Crossing tracks to reach or leave cars.

—It is the rule established by the authorities that a person, before crossing a railroad track, is bound to stop, look and listen for approaching trains; and if he fails to do so and is thereby injured, he cannot recover. But if a passenger train is stopped at a station or other usual place to receive or discharge passengers, or to permit them to change cars, where, in order to reach or leave the train, it is necessary to cross an intervening track, the passenger will have the right to assume that the way provided is reasonably safe, and that he will not be invited to use it at a time when trains are passing on the intervening track. He is not, therefore, while going to or leaving the train which has stopped at a place to receive or discharge passengers bound to stop, look and listen before crossing an intervening track, and his failure to do so will not, of itself, constitute such contributory negligence as will defeat a recovery if he is injured by a passing train.²¹ But the rule that

18. *Robertson v. The Railroad*, A. 432, 49 L. R. A. 102; *Graven v. McLeod*, 92 Fed. 846, 35 C. C. A.

19. *White v. The Railway*, 20 Wash. 132, 54 Pac. Rep. 999. 47; *Betts v. The Railroad*, 191 Penn. St. 575, 43 Atl. Rep. 362, 45

20. *Clark v. Zarniko*, 106 Fed. 607, 45 C. C. A. 494; *Railway Co. v. Rielly*, 40 Ill. App. 416. L. R. A. 261; *Girton v. The Railroad*, 199 Penn. St. 147, 48 Atl. Rep. 970; *Shutt v. The Railroad*, 149 Penn. St. 266, 24 Atl. Rep. 305;

21. *Warner v. Railroad*, 168 U. S. 339, 18 Sup. Ct. 68, *reversing* 7 App. D. C. 79; *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. R. 281, 38 L. Ed. 131; *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. R. 748, 37 L. Ed. 642; *Railway Co. v. King*, 99 Fed. 251, 40 C. C. Pennsylvania R. Co. *v. White*, 88 Penn. St. 327; *Railroad Co. v. Goodwin*, 62 N. J. Law, 394, 42 Atl. Rep. 333, 72 Am. St. Rep. 652, 45 L. R. A. 671; *Baltimore, etc., R. Co. v. State*, 60 Md. 449; *Philadelphia, etc., R. Co. v. Anderson*,

the passenger is not required to stop, look and listen before crossing an intervening track does not extend to the protection of a passenger who attempts to enter or leave the train at a time when no invitation is held out to him to do so.²² Where,

72 Md. 519; *Railroad Co. v. State*, 81 Md. 371, 32 Atl. Rep. 201; *Beecher v. The Railroad*, 161 N. Y. 222, 55 N. E. Rep. 899; *Brassell v. The Railroad*, 84 N. Y. 241; *Terry v. Jewett*, 78 N. Y. 338; *Jewell v. The Railroad*, 50 N. Y. Supp. 848, 27 App. Div. 500; *Warfield v. The Railroad*, 40 N. Y. Supp. 783, 8 App. Div. 479; *Goldberg v. The Railroad*, 60 Hun, 586, 15 N. Y. Supp. 579; *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. Rep. 593; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. Rep. 347; *Pennsylvania Co. v. McCaffery*, 173 Ill. 169, 50 N. E. Rep. 713; *Railroad Co. v. Ryan*, 165 Ill. 88, 46 N. E. Rep. 208; *Railroad Co. v. Taylor*, 102 Ill. App. 445; *Railroad Co. v. Czaja*, 59 Ill. App. 21; *Conway v. The Railroad*, 51 La. Ann. 146, 24 So. Rep. 780; *Railway Co. v. Lagerkrans*, 65 Neb. 566, 91 N. W. Rep. 358; *Railroad Co. v. Shean*, 18 Colo. 368, 33 Pac. Rep. 108, 20 L. R. A. 729; *Denver, etc., R. Co., v. Hodgson*, 18 Colo. 117, 31 Pac. Rep. 954; *Gulf, etc., Ry. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. Rep. 688; *Anderson v. The Railway (Canada)*, 27 Ont. R. 441; *Mac Feat v. Railroad Co.*, — Del. —, 62 Atl. Rep. 898; *Ill. Cent. R. v. Proctor*, — Ky. —, 89 S. W. Rep. 714; *Ray v. Railroad Co.*, — N. Car. —, 53 S. E. Rep. 622.

In *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. Rep. 593, it appeared that as the train upon

which the plaintiff was a passenger was approaching his destination, the station was announced, and that the train later came to a stop. No one warned the plaintiff that the train had taken a side track for the purpose of allowing another train to pass over an intervening track. The plaintiff alighted, and while crossing such track was struck by the passing train. The court said: "The duty of the passenger under such circumstances is not the positive one of first ascertaining whether there is danger ahead before he undertakes to get on or off the train, as the case may be, because he may act upon the implied assurance that all obstructions and interruptions of a dangerous character have been removed. He may assume that the railroad company has done its duty to provide him a safe landing. . . . He is not required to look out for and anticipate danger, as in the case of one, not a passenger, crossing at a public crossing or elsewhere."

In *Robostelli v. The Railroad*, 33 Fed. 796, the rule that the passenger is not required to stop, look and listen for approaching trains on an intervening track was applied where there was no station, but merely a gate through which it was customary for passengers to pass in leaving trains.

22. *Chaffee v. The Railroad*, 17 R. I. 658, 24 Atl. Rep. 141; *Weeks v. The Railroad*, 40 La. Ann. 800;

however, the passenger attempts to reach the train which he intends to take before it has come to a stop, it will not necessarily be negligence for him to cross an intervening track, without first stopping to look and listen, if the train is moving so slowly that a prudent person would reasonably believe that it was about to stop to receive passengers.²³ And if, by mistake, he attempts to reach a slowly moving train which he supposes is the proper one for him to take, he will not as a matter of law be chargeable with contributory negligence in failing to stop, look and listen for approaching trains on an intervening track, if the train which he is attempting to reach is slowing down, and it is about the time for the arrival of the train upon which he desires to take passage.²⁴ So a notice by the railway company warning passengers against crossing an intervening track will not avail the company as a defense to an action by the passenger for an injury received by him while crossing the track, where the company has made no attempt to enforce the notice and has permitted it to fall into disuse.²⁵

But while the passenger, in passing to or from a train which has been stopped at a place to receive or discharge passengers, is not required to stop, look and listen before crossing an intervening track, he is, nevertheless, bound to exercise ordinary care in avoiding known or obvious dangers; and if he omit to do so and is thereby injured, he will be chargeable with such contributory negligence as will defeat a recovery.²⁶ Thus, if

Railway Co. v. Sattler, 64 Neb. 636, 90 N. W. Rep. 649, 97 Am. St. Rep. 666, 57 L. R. A. 890; *s. c.* — Neb. —, 98 N. W. Rep. 663; *Van Ostrand v. D. & H. Co.*, 99 N. Y. Supp. 548.

Parsons v. Railroad Co., 37 Hun, 128. (In this case a passenger, without waiting for the train to reach the station and before it stopped, voluntarily jumped off and started across the adjoining track, where he was struck by another train. *Held*, that he could not recover.)

23. *Redhing v. The Railroad*, 68 N. J. Law 641, 54 Atl. Rep. 431.

24. *Redhing v. The Railroad, supra*. See also, *Hempenstall v. The Railroad*, 82 Hun, 285, 31 N. Y. Supp. 479.

25. *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. R. 281, 38 L. Ed. 131; *Railway Co. v. Slattery*, 3 App. Cas. 1155.

26. See *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. Rep. 347; *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. Rep. 593; *Dieckmann v. Railway Co.*, — Iowa,

the passenger knows, or in the exercise of ordinary care ought to know of the immediate approach of a train on the intervening track, and he deliberately attempts to cross in front of it and in consequence receives an injury, his imprudence will preclude him from the right to a recovery.²⁷

Sec. 1220. (§ 661b.) Crawling under trains to reach cars.

—The passenger will also be deemed guilty of contributory negligence where he is injured while attempting to reach his train by crawling under another train with a locomotive attached.²⁸

If he cannot reach his train without subjecting himself to peril, he should forego the attempt and seek his remedy against the company.

—, 105 N. W. Rep. 526; Pendleton's Adm'r v. Railroad Co., — Va. —, 52 S. E. Rep. 574.

27. *Roberts v. The Railroad*, 175 Mass. 296, 56 N. E. Rep. 559; *Winslow v. The Railroad*, 165 Mass. 264, 42 N. E. Rep. 1133; *Conolly v. The Railroad*, 158 Mass. 8, 32 N. E. Rep. 937; *Debbins v. The Railroad*, 154 Mass. 402, 28 N. E. Rep. 274; *Goldberg v. The Railroad*, 133 N. Y. 561, 30 N. E. Rep. 597; *Railway Co. v. Sattler*, 64 Neb. 636, 90 N. W. Rep. 649, 97 Am. St. Rep. 666, 57 L. R. A. 890. (In this case the passenger voluntarily left the train while it was standing on a side track and went to a nearby pump on the station premises to get a drink of water. In returning to his train he attempted to cross an intervening track in front of a swiftly moving train and received injuries from which he died. *Held*, that the railway company was not liable.) *De Kay v. The Railway*, 41 Minn. 178. (In this case the train was not at the platform, but was on a side track to permit another train then due to pass. While

waiting for this train, the passenger left his train and went to the village. He returned, and hearing the conductor cry "all aboard" rushed across the main track without looking and was struck by the other train which was coming in plain sight. *Held*, that he could not recover.) *Baltimore, etc., R. Co. v. State*, 63 Md. 135. (In this case a passenger was directed by the ticket agent to cross a track at a time when she could have done so with safety, though a train was approaching. After getting part way across, she turned back to get a parcel she had forgotten, and then, attempting to cross in the face of the remonstrances of by-standers, was struck and killed by the train, which had been all of the time in sight. *Held*, that no recovery could be had.) See also, *Kohler v. Railroad Co.* (Penn.), 19 Atl. Rep. 1049; *Pennsylvania R. Co. v. Bell*, 122 Penn. St. 58.

28. *Smith v. Railroad Co.*, 55 Iowa, 33, distinguishing *Rauch v. Lloyd*, 31 Penn. St. 358.

Sec. 1221. (§ 661c.) How far negligence excused by directions of carrier or his servants.—It frequently becomes important to determine how far an act of the passenger which might otherwise amount to contributory negligence may be excused by showing that it was done by the direction or authority of the carrier or his agents. Some consideration of this question has already been incidentally had in treating of other subjects, but more special attention to it seems to be desirable.

As a rule, it is a reasonable presumption that the carrier or his representatives are better informed of the nature and extent of the dangers incident to the journey than the passenger, and particularly of those which pertain to the special route adopted, the vehicle and motive power employed, the stational or other like accommodations, the position of the passenger in the vehicle, and the time, manner and place of entering or leaving it. The carrier, also, being charged with a very high degree of responsibility for the safety of the passenger, it may be presumed that he will be constantly upon the alert to see that the passenger may receive no injury, and, hence, will give no directions as to the passenger's conduct which will lead him into peril. In addition to all this, the carrier or his representative is clothed with a certain amount of authority over the passenger, and is usually in a position to enforce his demands upon him.

It is to be expected, therefore, that great weight will be attached to the carrier's directions, and that in ordinary cases they will be obeyed implicitly. No such directions, however, can justify the incurring of a plain hazard, nor, as has been said, can any authority or directions amount to a license to commit suicide.²⁹

29. *South, etc., R. Co. v. Schauf-ler*, 75 Ala. 136; *Lindsey v. Railway Co.*, 64 Iowa, 407; *Vimont v. Railway Co.*, 71 Iowa, 58; *Bardwell v. Railroad Co.*, 63 Miss. 574; *South-western R. Co. v. Singleton*, 67 Ga. 306; *Hunter v. Railroad Co.*, 126 N. Y. 18, 26 N. E. Rep. 958; *Lewis v. Canal Co.*, 145 N. Y. 508, 40 N. E. Rep. 248; *Railroad Co. v. Jean*, 98 Md. 546, 57 Atl. Rep. 540; *Staines v. The Railroad*, — N. J. Law —, 61 Atl. Rep. 385; *Turner v. The Railway*, 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. Rep. 883; *Railway Co. v. McClain*, 148

The passenger may, however, safely rely on the judgment of the carrier or those who represent him, where it is not plainly open to his observation that reliance will expose him to a danger that a prudent and reasonable man would not incur, and he cannot be charged with contributory negligence in obeying the directions of the carrier or his agents, unless such obedience leads to a known and obvious danger, which a reasonable and prudent man would not incur.³⁰

Ind. 188, 44 N. E. Rep. 306; Indianapolis, etc., Ry. Co. v. Barnes, — Ind. App. —, 74 N. E. Rep. 583.

Where the passenger is directed to take a position at the door of the car, preparatory to alighting, and while standing in such position he is caused by a sudden jerk of the train to catch the frame of the door for support and his hand is injured by the closing of the door, the carrier will be liable. Kentucky, etc., Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. Rep. 338.

If the passenger is reasonably misled by the announcement and conduct of the conductor into the belief that his station has been reached, it will not *per se* be negligent conduct on his part to go down the steps of the car for the purpose of alighting. Railroad Co. v. Jean, 98 Md. 546, 57 Atl. Rep. 540.

The direction or invitation of the conductor or other authorized agent will justify the passenger in complying therewith, unless by doing so he will expose himself to a danger so obvious that a prudent person would not incur it. Irish v. The Railroad, 4 Wash. 48, 29 Pac. Rep. 845, 31 Am. St. Rep. 899.

30. Jones v. Railway Co., 42

Minn. 182; Kansas, etc., R. Co. v. Dorrough, 72 Tex. 108; Baltimore, etc., R. Co. v. Kane, 69 Md. 11; Louisville, etc., R. Co. v. Kelly, 92 Ind. 371; Pool v. Railway Co., 53 Wis. 657, 56 *id.* 227; Hanson v. Railway Co., 38 La. Ann. 111; Pennsylvania Co. v. Hoagland, 78 Ind. 203; Lake Erie, etc., R. Co. v. Fix, 88 Ind. 381; St. Louis, etc., R. Co. v. Cantrell, 37 Ark. 519; Fowler v. Railroad Co., 18 W. Va. 579; Hickey v. Railroad Co., 14 Allen, 429; Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291; Cincinnati, etc., R. Co. v. Carper, 112 Ind. 26; Montgomery, etc., Ry. Co. v. Stewart, 91 Ala. 421, 8 S. Rep. 708; Lent v. Railroad Co., 120 N. Y. 467; Clinton v. Root, 58 Mich. 182.

Where the passenger, relying upon the directions of the carrier's agents, occupies a position known to him to be a place where danger might exist, he will be bound to exercise a prudent watchfulness to avoid such danger. He will not, however, be held to the duty of guarding against dangers which are not incident to the place he occupies, and if he receive an injury from the presence of a danger in no way connected with his position, he will not be barred from a recovery. Watson v. The

Whether the danger is so known and obvious that a reasonable and prudent man would not incur it is a question for the jury to be determined by the facts as they then appeared to him, and not by the result or in the light of better knowledge or more deliberate judgment.³¹

But where the passenger who has a first-class ticket is directed by a porter to ride in the smoking car, and he goes there without objection, he cannot recover for the inconvenience and discomfort thereby suffered.³²

Sec. 1222. Same subject—Direction by agent must be given while acting within scope of employment.—But in order to relieve the passenger from liability for contributory negligence, the directions which he seeks to rely upon must have been given by an agent or servant having, at least, apparent authority to give directions in respect to the action in question. Thus, to illustrate, it is said that “it is not incident to the employment of a station agent to assign seats to passengers upon a train. That is the business of the conductor. It is not within the apparent scope of the powers of a station agent. His duties and the nature of his office do not call for any intendment that he is authorized to give directions on this subject which will bind the company.” The company was therefore held not liable to a passenger who was riding on the top of a car by the direction of the station agent.³³ If he were riding there by the direction of the conductor, the result would have been otherwise.³⁴

Railroad, 55 N. J. Law 125, 26 Atl. Rep. 136, 39 Am. St. Rep. 624, 19 L. R. A. 487.

31. *Wilson v. Railroad Co.*, 26 Minn. 273; *Bucher v. Railroad Co.*, 98 N. Y. 128; *International, etc., R. Co. v. Hassell*, 62 Tex. 256; *Filer v. Railroad Co.*, 49 N. Y. 47, 59 *id.* 351, 68 *id.* 124; *Distler v. The Railroad*, 151 N. Y. 424, 45 N. E. Rep. 937, 35 L. R. A. 762; *Hinshaw v. The Railroad*, 118 N. Car. 1047, 24 S. E. Rep. 426.

32. *Brezewitz v. Railway Co.*, — Ark. —, 70 L. R. A. 212.

33. *Little Rock, etc. R'y Co. v. Miles*, 40 Ark. 298, citing *Tucker v. Railway Co.*, 54 Mo. 177; *Railroad Co. v. Reisner*, 18 Kans. 458; *Cooper v. Railroad Co.*, 6 Hun, 276; *Stephenson v. Railroad Co.*, 2 Duer, 341.

34. *Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 291. See also, *ante*, § 1067.

While, as a general rule, the direction of an agent, in order to justify what would otherwise be negligent conduct on the part of the passenger, must have been given while acting within the actual or apparent scope of his authority, circumstances may exist under which the passenger would be justified in relying on the direction of an agent, although such agent had ordinarily no authority to direct passengers. Thus, while a brakeman on a mixed train may ordinarily have no authority to give directions to passengers, if an emergency were to exist in which the life of the passenger was in imminent peril, the nature and purpose of his employment would undoubtedly imply the duty to give directions to prevent the threatened injury; and the passenger, while acting as a reasonably prudent person, would have the right to rely on such directions. In the case of *Ephland v. The Railway Co.*,³⁵ a brakeman on a mixed train who had no authority to give directions to passengers, or to assist in the management of the passenger cars, suddenly leaped down from the cupola of the caboose where he had been riding, and, in a terrified manner, shouted to the passengers in the car to jump for their lives, he himself jumping from the forward end of the car. Although the train was in rapid motion, no real danger was imminent. The plaintiff obeyed the command and in doing so was injured. It was insisted on behalf of the railway company that the brakeman, in directing the passengers to jump from the car, acted outside of the scope of his authority, and that the company ought not to be held responsible for his conduct. It was held, however, that while the brakeman may have had no direct authority to give directions to passengers, or to assist in the operation of the passenger cars, he nevertheless had implied authority, if it

35. 137 Mo. 187, 37 S. W. Rep. 820; 38 S. W. 926, 59 Am. St. Rep. 498, 35 L. R. A. 107. To same effect, see, *McPeak v. The Railway*, 128 Mo. 617, 30 S. W. Rep. 170.

general duties of a brakeman on a freight train to notify passengers to leave the caboose when it is about to be taken off on a side track. *Rosted v. The Railway*, 76 Minn. 123, 78 N. W. Rep. 971.

It is within the scope of the

were necessary to save the train and its passengers from disaster, to perform any duty for such purpose whether in the ordinary course of those assigned to him or not; that where a danger was threatened, any brakeman on the train could, in the name of the company, give warning to the passenger of the danger, and the passenger would have the right to rely and act upon such warning; that the terrifying acts and exclamations of the brakeman were, under the circumstances, within the scope of his employment, and the railway company was therefore responsible for his conduct. It was said that the scope of the authority of the agent was to be determined from the general nature of the employment and the emergency calling for its exercise as shown by the evidence in the particular case.

Sec. 1223. (§ 622.) Where the passenger is attempting to escape peril to which the carrier has exposed him.—But whatever may have been the conduct of the passenger, if it has been induced by the peril in which he has been placed by the misconduct or negligence of the carrier, or by a reasonable apprehension of danger caused unnecessarily and improperly by him, it will not be considered as negligence so contributory to the injury as to deprive him of his remedy against the carrier; for no principle of the law is better settled than that, if the party who owes a duty to another to provide for his safety expose him to peril by a negligent breach of that duty, the act of the latter in endeavoring to escape from the peril, although it may be the immediate cause of the injury, is not the less to be regarded as the wrongful act of the former.³⁶ Where the passenger upon a railway train saw another train approaching in an opposite direction with such speed as to make a collision inevitable, it was held that his jumping from the train, whereby he received an injury, was not such negligence under the circumstances as deprived him of a right to compensation

36. *England*: *Bridge v. The Rail-* stall, 13 Pet. 181; *Railroad Co. v.*
way, 3 M. & W. 244; *Carpue v.* Roller, 100 Fed. 738, 41 C. C. A.
The Railway, 5 Ad. & El. (N. S.) 22, 49 L. R. A. 77.
747; *Jones v. Boyce*, 1 Stark 493. *Arkansas*: *Railway Co. v. Mur-*
United States: *Stokes v. Salton-* ray, 55 Ark. 248, 18 S. W. Rep.

from the company, although if he had kept his seat he would not have been injured. "Seeing the danger in which he was placed," said the court, "the plaintiff was justifiable in seeking to escape injury by leaving the car. His act was not the result of a rash apprehension of danger that did not exist. By the merest chance the passengers in the same car with him, and who did not, like him, see the approaching collision, and who retained their seats, escaped uninjured. Although doubtless much excited, I do not think even that there was an error of judgment as to the course pursued to secure safety. . . . Seeing the approaching train, and that a collision, with its consequences, was inevitable, it was not the dictate of prudence to have deliberately kept his seat without an effort at

50, 29 Am. St. Rep. 32, 16 L. R. A. 787; *Railway Co. v. Maddry*, 57 Ark. 306, 21 S. W. Rep. 472.

California: *Lawrence v. Green*, 70 Cal. 417; *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. Rep. 747.

Colorado: *Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. Rep. 1106.

Georgia: *Southwest R. R. Co. v. Paulk*, 24 Ga. 356.

Illinois: *Benner, etc. Co. v. Busson*, 58 Ill. App. 17.

Indiana: *Indianapolis, etc. R. Co. v. Stout*, 53 Ind. 143.

Iowa: *Gradert v. The Railway*, 109 Iowa, 547, 80 N. W. Rep. 559, citing *Hutchinson on Carr.*

Maine: *Card v. Ellsworth*, 65 Me. 547.

Massachusetts: *Gannon v. The Railroad*, 173 Mass. 40, 52 N. E. Rep. 1075, 43 L. R. A. 833; *Caswell v. The Railroad*, 98 Mass. 194; *Sears v. Dennis*, 105 Mass. 310; *Ingalls v. Bills*, 9 Met. 1.

Maryland: *Railroad Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323, 14 L. R. A. 75.

Michigan: *Strand v. The Railway*, 64 Mich. 216.

Minnesota: *Wilson v. The Railroad*, 26 Minn. 278.

Missouri: *Chitty v. The Railway*, 148 Mo. 64, 49 S. W. Rep. 868; *Estes v. The Railway*, 110 Mo. App. 725, 85 S. W. Rep. 627.

Nebraska: *Railroad Co. v. Hedge*, 44 Neb. 448, 62 N. W. Rep. 887.

New York: *Curtis v. The Railroad*, 18 N. Y. 534; *Coulter v. Express Co.*, 56 N. Y. 585; *Eldridge v. The Railroad*, 1 Sandf. 89.

Ohio: *Iron R. Co. v. Mowery*, 36 Ohio St. 418.

Oregon: *Budd v. Carriage Co.*, 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279.

Pennsylvania: *Pittsburgh v. Grier*, 22 Penn. St. 54.

Texas: *Williams v. The Railway*, — Tex. Civ. App. —, 78 S. W. Rep. 45; *La Prelle v. Fordyce*, 4 Tex. Civ. App. 391, 23 S. W. Rep. 453.

Vermont: *Ranney v. The Railroad*, 67 Vt. 594, 32 Atl. Rep. 810.

West Virginia: *Dimmey v. The Railroad*, 27 W. Va. 32.

self-preservation. There is no man, under the circumstances, retaining his senses and acting with ordinary prudence, that would not have exerted himself in some way to escape the great peril. It was not to invite, but to escape, injury that he left his seat and rushed to the door of the car.''³⁷

Sec. 1224. (§ 662a.) Same subject—The test of the carrier's liability.—But where the passenger encounters peril in an effort to escape from an apprehended danger, and in consequence sustains an injury, it must appear, in order to make the carrier responsible, that the danger was imminent and was such as to reasonably induce in the mind of a person of ordinary prudence a belief that to make no attempt to escape would be attended with destruction of life or serious bodily harm. In other words, there must have been reasonable cause for alarm; for if the effort of the passenger to escape resulted from the rash apprehension of danger which did not exist, the injury would be attributed to his own imprudent conduct, and he would be without remedy.¹ So a fear of slight injury would

37. Buel v. The Railroad, 31 N. Y. 314.

If, owing to the reckless, unskilful or negligent operation of the train, the passenger is placed in a situation so apparently dangerous as to reasonably create in his mind an apprehension of injury, and in an effort to escape he is injured, the carrier will be responsible although he would not have been injured had he remained in his place. *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. Rep. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787.

Where a passenger upon a railway train observes a second train rapidly approaching upon the same track, it being but a few hundred feet away, he is not required to enter into mental calculations as to whether or not it

will be safer to remain upon the train and trust to some avertment of a collision, or, on the contrary, to escape from the scene of danger at the quickest possible moment. Under such circumstances it is not negligence for him to jump from the train while in motion. *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. Rep. 747.

Where the passenger left the train to avert an apprehended injury, and came in contact with some poison ivy which was growing alongside the track, and received injury, it was held that the railway company was liable. *Estes v. The Railway*, 110 Mo. App. 725, 85 S. W. Rep. 627.

1. While a passenger train was standing on the track, a freight-train approached from the rear on

not justify the passenger in encountering the risk of greater injury in order to avoid it. Thus a railway company would not be liable where the passenger leaps from a train which is running at such a rate of speed as to make death or great bodily harm inevitable, unless the threatened danger which he sought to escape was such as reasonably to have induced in his mind a belief that to remain would result in great bodily harm.² In determining in such cases whether the act of the passenger was justified, the test to be applied is whether, in view of the danger as it appeared to him at the time he sought to escape, and the means of escape at hand, he acted as a reasonably prudent person would have acted if placed in a like situation.³

the same track, but was under full control, stopping at least fifty yards from the passenger-coach, and creating no real danger. A passenger who saw it approaching exclaimed, "a freight-train is upon us," and the plaintiff, who was also a passenger, arose, saw the train coming about four hundred yards distant, and without waiting ran with his wife and leaped from the car, sustaining injury. *Held*, that the company was not liable. *Gulf, etc. R'y Co. v. Wallen*, 65 Tex. 568.

A passenger was riding in the caboose of a freight-train. On the freight-car immediately ahead was a load of lumber. While the train was running fourteen or fifteen miles an hour, a stake holding the lumber gave way and some of it fell off, striking against the caboose and making some noise, but doing no injury and creating no real danger. The passenger, however, immediately leaped from the car and was killed. The jury found that there was not sufficient cause for alarm to cause a pru-

dent man to jump from the car under these circumstances, and the judgment for the carrier was affirmed. *Woolery v. Railway Co.*, 107 Ind. 381.

A passenger, erroneously thinking that certain signals given by the trainmen were signals of danger, left his car, which was in no danger, and ran across an adjoining track upon which a train was approaching, for the guidance of which the signals were given. The latter train struck and injured him. *Held*, that the company was not liable. *Chicago, etc. R'y Co. v. Felton*, 125 Ill. 458.

2. *Woolery v. The Railway, supra*. See, also, *Williams v. The Railway*, (Tex. Civ. App.) 78 S. W. Rep. 45.

3. *Chitty v. The Railway*, 148 Mo. 64, 49 S. W. Rep. 868. *Railroad Co. v. Hedge*, 44 Neb. 448, 62 N. W. Rep. 887.

On occasions where the passenger is suddenly confronted by imminent danger and peril, he cannot reasonably be expected to calculate chances, or to deliberate

Whether or not he has so acted will be a question of fact for the jury. "Was the attempt," said the court in the case of *Wilson v. The Railroad*,⁴ "an unreasonable, precipitate or rash act, or was it an act which a person of ordinary prudence might do? This is not determined by the result of the attempt to escape, nor by the result that would have followed had the attempt not been made. To permit that to determine it would be, in effect, to require the passenger to judge with absolute certainty the extent to which the danger would go if he made no move, and with like certainty the consequences of an attempt to escape. . . . The passenger in such a case must of necessity judge of the danger in remaining where he is, as also of the danger in attempting to escape, by the circumstances as they appear to him, and not by the result. He acts upon the probabilities as they appear to him; and, if he acts as a man of ordinary prudence would in such case act, he will choose the hazard that from these circumstances appears to him to be the least. . . . That he was injured in his attempt to escape, and that those who remained were unhurt, might, of course, be considered by the jury in determining this question."

Sec. 1225. (§ 663.) Avoiding an inconvenience to which the negligence of the carrier has exposed him.—How far the

upon the means of escape, but must of necessity judge hastily of the danger of remaining where he is, as also of the danger in attempting to escape, by the circumstances as they at the instant appear to him and not by the result. He acts upon the probabilities as they appear to him; and if he acts as a man of ordinary prudence, placed in the same circumstances and situation and under a like necessity of immediate action and decision, would have acted, and in so doing receives an injury, the railway com-

pany will be responsible. *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. Rep. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787.

In determining whether or not the passenger acted prudently in attempting to escape from an apprehended danger, evidence of what other passengers exposed to the same danger said and did in the excitement of the moment is properly admissible. *Railway Co. v. Murray*, *supra*; *Ranney v. The Railroad*, 67 Vt. 594, 32 Atl. Rep. 810.

4. 26 Minn. 278. See also an

passenger will be justified in exposing himself to danger in order to rid himself of an inconvenience to which the negligence of the carrier has exposed him, while upon his journey, has also been the subject of consideration by the courts. The door of the railway carriage in which the plaintiff was a passenger flew open several times by reason of insecure fastening, caused by the negligence of the company, and the plaintiff, in the attempt to fasten it, fell out and was injured. The inconvenience to which he was subjected by the door standing open was, however, thought by the judges not to justify the exposure of himself to danger by the passenger in his attempt to shut it, and he was consequently nonsuited. But Bret, J., said: "It has been argued that no amount of inconvenience, if there be no *actual peril*, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience.⁵ I think here

excellent statement of the rule in *Strand v. The Railway*, 64 Mich. 216, 219.

5. In *Western, etc. R. Co. v. Stanley*, 61 Md. 266, it appeared that the passenger was injured in attempting to close the door of the car. The train was passing through a tunnel and the smoke from the engine poured into the car through the open door. Some one in the car shouted "Shut the door;" there was no servant of the company present to do it, and the passenger in question, who was sitting near the door, arose and attempted to close it. It was held that this was not contributory negligence.

See also, *Railroad Co. v. Bedell*,

11 Colo. App. 139, 54 Pac. Rep. 280.

So where a female passenger was greatly incommoded by tobacco smoke in the room at a station provided for passengers awaiting the arrival of trains, and consequently went to the end of the platform and attempted there to descend, in order to get upon the train before it was drawn up to the platform, and while so descending one of the steps gave way, and she was precipitated upon the track and injured, it was held that she was entitled to recover from the company for the injury. "If the station room," it was said, "is full, or if it is intolerably offensive by reason of

the jury might well find that there was no obvious danger, and that the act was not carelessly done; but I think the inconvenience was not so great as to make it reasonable for the plaintiff to get rid of it in this way. It was a July afternoon. There was no evidence of the weather being bad, and in three minutes the train would have arrived at the next station. I think, therefore, there was no great inconvenience; and though the danger was not obvious, I think it could not be said that the act was not dangerous in itself; and under these circumstances, I think the putting himself into peril was contributory negligence, and that the case therefore ought not to have been left to the jury.'⁶ And this language was subsequently approved by all the judges in the exchequer chamber.⁷

Sec. 1226. (§ 664.) Negligence on one kind of vehicle may not be on another.—But it is to be observed that negligence is to some extent a relative term, and that that which will constitute contributory negligence of a passenger upon one kind of conveyance will not necessarily do so upon another. It behooves the passenger to be more cautious and circumspect upon a train of cars moved by the powerful and dangerous agency of steam than upon one moved by animal power. These move

tobacco smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed." *McDonald v. The Railroad*, 26 Iowa, 124.

But where the passenger jumped from a side-door of a compartment passenger and baggage car because the regular exits to the car were crowded with other passengers who were alighting, and in doing so received an injury, it was held that as she had failed to heed the known regulations of the company regarding egress from the cars, she could not recover. *Derry v. The Railroad*, 163 Penn. St. 403, 30 Atl. Rep. 162.

6. *Adams v. The Railway*, L. R. 4 C. P. 739.

7. *Gee v. The Railway*, L. R. 8 Q. B. 161.

with less speed, and are not exposed to danger from collisions and the numerous accidents to which the former are continually liable. It has accordingly been held, as has been seen,⁸ that it is not, in all cases, such contributory negligence to ride upon the platforms of such cars as to preclude the passenger from recovering for an injury sustained by the negligence of employees of the company.⁹

Sec. 1227. (§ 666.) Contributory negligence as affected by the infancy of the passenger.—Passengers of any age or of any degree of discretion may commit acts of negligence from which they may receive injury for which the carrier could not be held responsible, although he himself might not be entirely free from fault; and there are authorities entitled to high consideration, which make no distinction, so far as the liability of the carrier is concerned, between the effect of contributory acts of negligence when done by those who have not come to years of discretion, and when done by those who have.¹⁰ But the great weight of authority in this country, at least, is opposed to the rule which would put the child and grown person upon the same footing as to the consequences of contributory negligence, when the liability of another whose negligence has also concurred in causing a personal injury is in question; and it may be stated as the almost universally prevailing law, that the same acts which will be considered such concurring or contributory negligence as will excuse the carrier from liability for an injury in the case of one who has so far come to years of discretion as to be fully responsible for his conduct, will not always be so considered when done by one from whom, on account of his lack of years, the same care and caution cannot

8. See *ante*, § 1199.

9. *Seigel v. Eisen*, 41 Cal. 109; *Burns v. The Railway Co.*, 50 Mo. 139; *Wilton v. The Railroad*, 107 Mass. 108; *Meesel v. The Railroad*, 8 Allen, 234; *Augusta R. R. v. Renz*, 55 Ga. 126; *Ginna v. The Railroad*, 67 N. Y. 596; *Clark v. The Railroad*, 32 Barb. 657.

10. *Honegsberger v. The Railroad*, 1 Keyes (N. Y.), 570; *Burke v. The Railroad*, 49 Barb. 529; *Pittsburgh, etc. R'y Co. v. Vining*, 27 Ind. 513; *Brown v. The Railroad*, 58 Me. 384; *Hughes v. Macfie*, 2 Hurl. & Co. 744; *Lygo v. Newbold*, 9 Exch. 302.

be expected, and that greater diligence and circumspection will be required of the carrier in avoiding injury to the latter than to the former, whenever the danger can be foreseen. And it has been said that the law has made contributory negligence an excuse for the carrier, not out of any tenderness for the negligent infliction of an injury, but to discourage carelessness, and that in determining whether the fault exists, the condition of the person whose acts are in question should be considered; and that the old, the lame, the infirm and the young are entitled to have their condition and ability, mental and physical, considered in diminution of the care exacted of them, and that no greater degree of care will be required than the capacity of the person will allow him to exert.¹¹

Sec. 1228. (§ 666a.) Same subject—When negligence will be imputed to children.—Going a little more fully into details, it may be said that a child of tender years will not be chargeable with negligence,¹² but that when he has arrived at such

11. *Mowrey v. The Railway*, 51 N. Y. 666; *Thurber v. The Railroad*, 60 *id.* 326; *Lynch v. Smith*, 104 Mass. 52; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Gray v. Scott*, 66 Penn. St. 345; *Daniels v. Clegg*, 28 Mich. 32; *Daley v. The Railroad*, 26 Conn. 591; *Robinson v. Cone*, 22 Vt. 213; *Schmidt v. The Railway*, 23 Wis. 186; *Chicago, etc. R. R. v. Murray*, 71 Ill. 601; *Hund v. Geier*, 72 Ill. 393; *Paducah, etc. R. R. v. Hoehl*, 12 Bush. 41; *B. & I. R. R. v. Snyder*, 18 Ohio St. 399; *Whirley v. White-man*, 1 Head, 610; *Karr v. Parks*, 40 Cal. 188; *Boland v. The Railroad*, 36 Mo. 484; *Rauch v. Lloyd*, 31 Penn. St. 358.

If a child ten years of age is, by the carrier's negligence, carried beyond his destination, and he is thus induced to jump from the train from which act he sustains

injury, the question whether he was of sufficient maturity to be responsible for his act is for the jury; if he was not of sufficient intelligence to be responsible for his act, which might have been negligence in a person of more mature years, the carrier would be responsible for the injury. *Avery v. The Railway*, 81 Tex. 243, 16 S. W. Rep. 1015, 26 Am. St. Rep. 809.

There is no fixed degree of care required of minors. They must use that ordinary and reasonable care which ought to be expected of children of like age, capacity and intelligence. *Ill. Cent. R. Co. v. Johnson*, — Ill. —, 77 N. E. Rep. 592.

12. *Westbrook v. Railroad Co.*, 66 Miss. 560; *Stone v. Railroad Co.*, 115 N. Y. 104; *Dealey v. Muller*, 149 Mass. 432; *Twist v. Railroad*

an age and degree of maturity that judgment and discretion may properly be expected of him, he will be held bound to exercise that carefulness for his own protection which his age, capacity and surroundings will reasonably warrant.¹³ Whether he has reached such a stage is a question for the jury to determine in view of all the facts.¹⁴

Sec. 1229. (§ 667.) Imputability of the negligence of those who have infants and imbeciles in charge.—The question of

Co., 39 Minn. 164; Bradford (City of) *v. Downs*, 126 Pa. St. 622.

13. *Eswin v. Railway Co.*, 96 Mo. 290; *Twist v. Railroad Co.*, 39 Minn. 164; *Wendell v. Railroad Co.*, 91 N. Y. 420; *Messenger v. Dennie*, 141 Mass. 335; *Chicago, etc. R. Co. v. Eininger*, 114 Ill. 79; *Brown v. Railway Co.*, 58 Me. 384; *Murray v. Railroad Co.*, 93 N. C. 92; *Masser v. Railway Co.*, 68 Iowa, 602; *Gillespie v. McGowan*, 100 Pa. St. 144; *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; *Western, etc. R. Co. v. Young*, 81 Ga. 397; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Gladman*, 15 Wall. 401; *Gray v. Scott*, 66 Pa. St. 345; *Robinson v. Cone*, 22 Vt. 213; *Lynch v. Smith*, 104 Mass. 52; *Mulligan v. Curtis*, 100 Mass. 512; *Plumley v. Birge*, 124 Mass. 57; *Hicks v. Railroad Co.*, 64 Mo. 430; *Kay v. Railroad Co.*, 65 Pa. St. 269; *Manly v. Railroad Co.*, 74 N. C. 655; *Mobile, etc. R'y Co. v. Crenshaw*, 65 Ala. 566; *Houston, etc. R'y Co. v. Simpson*, 60 Tex. 103; *Gulf, etc. R. Co. v. Moore*, 59 Tex. 64; *Barry v. Railroad Co.*, 92 N. Y. 289; *Byrne v. Railroad Co.*, 83 N. Y. 620; *Chicago, etc. R'y Co. v. Smith*, 46 Mich. 504; *Railroad Co. v. Scott*, 111 Ill. App. 234; *Schreiner v.*

The Railroad, 42 N. Y. Supp. 163, 12 App. Div. 551.

It cannot be said as a matter of law that a youth 16 years old, who is traveling alone on a railroad train, is not endowed with sufficient intelligence and discretion to avoid the consequences of acts which the law considers culpably negligent. *Benedict v. The Railroad*, 86 Minn. 224, 90 N. W. Rep. 360, 91 Am. St. Rep. 345, 57 L. R. A. 639.

14. In *Stone v. Railroad Co.*, 115 N. Y. 104, *Andrews, J.*, says: "It cannot be asserted, as a proposition of law, that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 344. Infants, under seven years of age, are deemed incapable of committing crime, and by the common law, such incapacity presumptively continues until the age of fourteen. An infant, between those ages, was regarded as within the age of possible discretion; but on a criminal charge, against an infant between those ages, the burden was upon the prosecutor to show that the defendant had intelligence and ma-

contributory negligence in such cases may be also complicated by the further question, whether the negligence of the parent or other person having the care and control of a child, or of one who is not able, from his mental or physical condition, to take care of himself, shall be imputed to the latter as his own negligence. Upon this question there is also diversity of opinion, many of the courts holding that the parents or guardians are at least bound to take such reasonable care of their children or wards as the circumstances of the case and their condition in life will permit,—a question of fact for the jury,¹⁵—and that the party through whose agency the injury has been inflicted, and who attempts to exonerate himself from responsibility for it upon the ground of the contributory negligence of the parent or guardian, may have the benefit of such imputability.¹⁶ And this is the rule which has been adopted by the

turity of judgment sufficient to render him capable of harboring a criminal intent. . . In administering civil remedies, the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four years of age could not be regarded as *sui juris*, and the same was said, in another case, of an infant five years of age. *Mangam v. Railroad Co.*, 38 N. Y. 455; *Fallon v. Railroad Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden*, 49 N. Y. 255, that a lad, six years of age, could not be assumed to be incapable of protecting himself from danger in streets or roads; and, in another case, that a boy eleven years of age was competent to be trusted in the streets of a city. *McMahon v. Mayor*, 33 N. Y. 642.

"From the nature of the case, it is impossible to prescribe a fixed

period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life and surroundings. These, and other circumstances, may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact." See, also, *Bridger v. Railroad Co.*, 25 S. C. 24.

15. *Weil v. Railroad Co.*, 119 N. Y. 147; *Winters v. Railway Co.*, 99 Mo. 509; *Isabel v. Railroad Co.*, 60 Mo. 475; *Walters v. Railroad Co.*, 40 Iowa, 71; *Pittsburgh, etc. R'y Co. v. Pearson*, 72 Penn. St. 169; *Philadelphia, etc. R. Co. v. Long*, 75 Penn. St. 257; *Kay v. Railroad Co.*, 65 Penn. St. 269; *Glasse v. Railroad Co.*, 57 Penn. St. 172.

16. *Leslie v. Lewiston*, 62 Me.

English courts.¹⁷ But the question has been ruled in a contrary way by other cases, and the right of a defendant to rely upon the negligence of another than the child who has been injured has been denied,¹⁸ except where the recovery is sought by the negligent parent or guardian in his own right;¹⁹ and the reason for this rule, it is said, lies in the irresponsibility of the child who, being incapable of negligence, cannot authorize it in another.²⁰ And this latter would seem to be the better rule.²¹

468; *Brown v. Railway Co.*, 58 Me. 384; *Lynch v. Smith*, 104 Mass. 53; *Gibbons v. Williams*, 135 Mass. 335; *Fitzgerald v. Railway Co.*, 29 Minn. 336; *Railroad Co. v. Grable*, 88 Ill. 442; *Railway Co. v. Smith*, 28 Kan. 542; *Meeks v. Railway Co.*, 52 Cal. 603; *Stillson v. Railway Co.*, 67 Mo. 674; *Messenger v. Dennie*, 137 Mass. 197; *Holly v. Gas Co.*, 8 Gray, 123; *Callahan v. Bean*, 9 Allen, 401; *Hartfield v. Roper*, 21 Wend. 615; *Morrison v. The Railway*, 56 N. Y. 302; *Ross v. Innis*, 26 Ill. 259; *Chicago v. Starr*, 42 Ill. 174; *Jeffersonville R. R. v. Bowen*, 40 Ind. 545; *Hathaway v. The Railway*, 46 *id.* 25; *Louisville Canal Co. v. Murphy*, 9 Bush. 522.

17. *Singleton v. The Railway*, 7 C. B. (N. S.) 287; *Waite v. The Railway*, El. & El. 719; *Mangan v. Atterton*, L. R. 1 Exch. 239.

18. *Bronson v. Southbury*, 37 Conn. 199; *Daley v. The Railroad*, 26 *id.* 591; *City v. Kuby*, 8 Minn. 154; *Boland v. The Railroad*, 36 Mo. 484; *Robinson v. Cone*, 22 Vt. 213; *Crissey v. The Railway*, 75 Penn. St. 83; *Pennsylvania R. R. v. Kelley*, 31 *id.* 372; *Philadelphia R. R. v. Spearen*, 47 *id.* 300; *Bellefontaine, etc. R. R. v. Snyder*, 18 Ohio St. 399, 24 *id.* 670;

Norfolk, etc. R. R. v. Ormsby, 27 Gratt. 455; *Walters v. The Railroad*, 41 Iowa, 71; *Baltimore City R'y v. McDonnell*, 43 Md. 534; *Isabel v. The Railroad*, 60 Mo. 475; *Huff v. Ames*, 16 Neb. 139; *Railway Co. v. Moore*, 59 Tex. 64; *Railway Co. v. Schuster*, 113 Penn. St. 412; *Wymore v. Mahaska Co.*, 78 Iowa, 398; *Whirley v. Whiteman*, 1 Head, 620; *Winters v. Railway Co.*, 99 Mo. 509; *Railroad Co. v. Rexwood*, 59 Ark. 180, 26 S. W. Rep. 1037; *Allen v. The Railway*, (Tex. Civ. App.) 27 S. W. Rep. 943.

See also, *Battishill v. Humphreys*, 64 Mich. 494, containing a strong *dictum* to this effect.

19. *Smith v. Railway Co.*, 92 Penn. St. 450; *Huff v. Ames*, 16 Neb. 139; *Bellefontaine, etc. R. Co. v. Synder*, 24 Ohio St. 670; *Railway Co. v. Schuster*, 113 Penn. St. 412; *Wymore v. Mahaska Co.*, 78 Iowa, 398; *Winters v. Railway Co.*, 99 Mo. 509.

20. The negligence of the parent is not imputable to the child, and therefore cannot be considered when the suit is by the child or its personal representative. The doctrine of *Hartfield v. Roper*, 21 Wend. 615, (cited *supra*), has been repudiated in many of the states, and the doctrine as above

Sec. 1230. (§ 668.) Contributory negligence, as affected by the intoxication of the passenger.—The mere fact that the passenger is intoxicated will not, as we have seen, justify the carrier in excluding him from his conveyance, so long as he conducts himself in a quiet and peaceable manner.²² Nor will intoxication excuse the carrier from liability for injury to the passenger by negligence, or justify the exposure of the passenger to danger.²³ Intoxication does not *per se* constitute contributory negligence, but is a matter to be taken into consideration as bearing on the question whether the passenger has, by his own conduct, brought the injury upon himself. The law exacts from one who is voluntarily intoxicated the same degree of care and caution in avoiding an exposure of his person to danger as it exacts from a sober person of ordinary prudence under like circumstances. If intoxication renders the passenger indifferent or thoughtless, and, in consequence, he fails to exercise ordinary care to protect himself from danger and is injured, it will be no excuse to him that his failure to do so was superinduced by a state of intoxication.²⁴ Where, therefore,

stated laid down. The reason lies in the irresponsibility of the child who, being incapable of negligence, cannot authorize it in another. Neither would it be correct to say that the parent is the agent of the child, since the latter cannot in law appoint an agent. The law confides the care and custody of a child *non sui juris* to the parent, but if this duty be not performed, the fault is with the parent and not the child. *Norfolk, etc. R. Co. v. Groseclose*, 88 Va. 267, 13 S. E. Rep. 454, 29 Am. St. Rep. 718.

21. See *post*, § 1382.

22. *Putnam v. The Railroad*, 55 N. Y. 108; *ante*, sec. 969.

23. *Atchison, etc. R. Co. v. Weber*, 33 Kan. 543; *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469.

24. *Kingston v. The Railway*, 112 Mich. 40, 70 N. W. Rep. 315, 40 L. R. A. 131; *Strand v. The Railway*, 67 Mich. 380; *Railroad Co. v. Johnson*, 92 Ala. 204, 9 So. Rep. 269, 25 Am. St. Rep. 35; *s. c. Johnson v. The Railroad*, 104 Ala. 241; 16 So. Rep. 75, 53 Am. St. Rep. 39; *s. c. 108 Ala. 62*, 19 So. Rep. 51, 31 L. R. A. 372; *Railroad Co. v. State*, 81 Md. 371, 32 Atl. Rep. 201; *Fisher v. The Railroad*, 42 W. Va. 183, 24 S. E. Rep. 570, 33 L. R. A. 69; *Wheeler v. The Railway*, 70 N. H. 607, 50 Atl. Rep. 103, 54 L. R. A. 955; *Cincinnati, etc. R. Co. v. Cooper*, 120 Ind. 469; *Welty v. The Railroad*, 105 Ind. 55; *Texas, etc. R. Co. v. Bryant*, (Tex. Civ. App.) 72 S. W. Rep. 885.

the negligence of the carrier has been such as would not in all probability have occasioned the injury to a sober man, or such that a sober man could have easily escaped its consequences, the presumption will be that the passenger met with it as the consequence of his condition, in which event he will be without remedy against the carrier. But if it could be shown that the accident would have occurred with the same consequences if the passenger had been sober, or that his inebriety was not the proximate cause, and was not the reason why he did not escape from the danger into which the negligence of the carrier had brought him, the mere fact that he was at the time intoxicated would not deprive him of his right to recover.²⁵ So where the authorized agents of the carrier accept an unattended person as a passenger with knowledge that he is so intoxicated as to be mentally and physically incapable of protecting himself from danger, the question of contributory negligence cannot arise.²⁶

Whether or not the injury was attributable to the intoxication of the passenger or to the negligence of the carrier, as the proximate cause, would be a question within the province of a jury to determine.²⁷

25. *Milliman v. The Railroad*, 66 N. Y. 642; *Whalen v. The Railway*, 66 Mo. 323; *Schierhold v. The Railroad*, 40 Cal. 447; *Telfer v. The Railroad*, 30 N. J. Law, 188; *Meyer v. The Railroad*, 40 Mo. 151; *Stewart v. Machias Port*, 48 Me. 477; *Toledo, etc. R. R. v. Riley*, 47 Ill. 514; *Cassedy v. Stockbridge*, 21 Vt. 391; *Alger v. Lowell*, 3 Allen, 402; *Chicago, etc. R. R. v. Gregory*, 58 Ill. 226; *Thorp v. Brookfield*, 36 Conn. 320; *Chicago, etc. R. R. v. Bell*, 70 Ill. 102; *Maguire v. The Railroad*, 115 Mass. 239; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536; *Railroad Co. v. Lawrence*, 96 Ill. App. 635.

Although the passenger may have been intoxicated when injured, he will not be deprived of the right to recover, unless by reason thereof he failed to exercise ordinary care for his safety. *Ill. Cent. R. Co. v. Proctor*, — Ky. —, 89 S. W. Rep. 714.

It will be immaterial, upon the question of the negligence of the carrier in causing an injury to a passenger, that such passenger's intoxication was in violation of a statute. *Wheeler v. The Railway*, 70 N. H. 607, 50 Atl. Rep. 103, 54 L. R. A. 955.

26. *Price v. The Railway*, — Ark. —, 88 S. W. Rep. 575.

27. See *Railway Co. v. Wagley*,

Sec. 1231. Contributory negligence as affected by the blindness or deafness of the passenger.—Blind and deaf passengers may be so far chargeable with contributory negligence as to be entirely debarred from recourse against the carrier for injuries which they may sustain.²⁸ If their unfortunate condition be unknown to the carrier, he will not be responsible for the injuries of which it may be the cause, if the situation in which his negligence has placed them is such as could be attended with danger only to those afflicted by such infirmities. If in such situations they adopt a course of conduct which prudent persons with perfect senses would have seen or known the danger of, and are thereby injured, the carrier will not be responsible. In *Bridges v. The Railway*,²⁹ the train of the railway company in which the passenger was traveling overshot the platform, and, being nearsighted, he supposed that his carriage was at the proper place for passengers to alight, and attempted to do so. But the place was one wholly unsuited for that purpose, and in the attempt to alight the passenger fell and was killed. The fact of his nearsightedness was relied upon as an excuse for his conduct, and it was contended that the accident had been caused and was to be attributed solely to the negligence of the road. But all the judges were of opinion that the defect of vision could not affect the question of the liability of the company, and that the passenger having done an imprudent thing, which had brought upon him the misfortune, and one which no prudent man, seeing the situation, would have done, the company should not be held liable.

Sec. 1232. (§ 671.) Traveling on Sunday.—The fact that the passenger was traveling on Sunday, although it may have been in violation of a statute which expressly prohibited it, except in cases of necessity or charity, will be no defense to an

91 Fed. 860, 34 C. C. A. 114; *Newton v. The Railroad*, 80 Hun, 491, 30 N. Y. Supp. 488. *v. McKean*, 40 Ill. 218; *Sleeper v. Sandown*, 52 N. H. 244; *Poole v. The Railroad*, 8 Jones (Law), 340.

28. *Illinois Cent. R. R. v. Buckner*, 28 Ill. 299; *Chicago, etc. R. R.* 29. L. R. 6 Q. B. 377.

action by him caused by the negligence of the carrier. In *Carroll v The Railroad*,³⁰ the plaintiff was injured by the explosion of a boiler upon a ferry-boat, while traveling thereon in violation of such a law, and one ground of the defense was that, as he was traveling in violation of law, he could not recover for the injury sustained while doing so. But it was said that the law did not prohibit the carrier from carrying passengers on Sunday, and that as to him, therefore, the contract was not void, and he was entitled to demand compensation for the carriage. "Can the defendant," it was then asked, "under such circumstances, having entered into a contract which he might lawfully make, escape from liability for a negligent performance, on the ground that the motive and purpose of the other party in making it were unlawful? May he take the benefit of the contract and be exempted from its responsibilities? Does this case constitute an exception to the rule that the obligation of a contract must be mutual; and may one party resist performance and at the same time exact it from the other?"

Sec. 1233. (§ 672.) Same subject.—But it was said that the gravamen of the action was the breach of duty imposed by the law upon the carrier of passengers, to carry safely, so far as human skill and foresight could go, the persons he undertakes to carry. There was, therefore, no necessity for supposing any contract whatever between the parties. This duty the law raises out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands, and is as obligatory upon the carrier as to the passengers whom he undertakes to carry on Sunday as upon any other day. It was therefore held that the fact that the injury occurred to the plaintiff while traveling on Sunday interposed no obstacle to his recovery. And this is the law generally adopted by the courts in this country,³¹ including the supreme court of the United

30. 58 N. Y. 126.

342; *Augusta R. R. v. Renz*, 55

31. *Mohney v. Cook*, 26 Penn. St. Ga. 126; *Norris v. Litchfield*, 35

States,³² in which it was said by Grier, J., that "the law relating to the observance of Sunday defines a duty of a citizen to the state and to the state only. For a breach of this duty he is liable to the fine or penalty imposed by the statute, and nothing more." And such is the law in England.³³ But the supreme court of Massachusetts formerly held that one who travels upon the Sabbath, unless it be done from necessity, or for purposes of charity, can recover nothing from the carrier for any injury which he may sustain by the latter's negligence.³⁴ Such also would seem to be the law of Maine³⁵ and Vermont.³⁶ By statute, in Massachusetts, however, the rule is now changed.³⁷

Sec. 1234. Care to be exercised by passenger after having been wrongfully ejected from train or negligently carried beyond his destination.—Where the passenger has been wrongfully ejected from the train upon which he has secured the right to be carried, and is thereby left upon the track, his presence upon the track cannot be imputed to him as negligence. But, while upon the track, he is required to exercise for his safety such care and prudence as a reasonably prudent per-

N. H. 271; *Corey v. Bath*, *id.* 530; *Kerwhacker v. The Railroad*, 3 Ohio St. 172; *Sutton v. Wauwatosa*, 29 Wis. 21; *Frost v. Plumb*, 40 Conn. 111; *Merritt v. Earle*, 31 Barb. 38; s. c. 29 N. Y. 115; *Merchants', etc. Ass'n v. Wood*, 64 Miss. 661; *Louisville, etc. R'y Co. v. Frawley*, 110 Ind. 18; *Johnson v. Railroad Co.*, 18 Neb. 690; *Smith v. Railway Co.*, 46 N. J. L. 7; *Sewell v. Webster*, 59 N. H. 586; *Knowlton v. Railway Co.*, 59 Wis. 278; *Platz v. Cohoes*, 89 N. Y. 219; *Wagner v. Railroad Co.*, 97 Mo. 512.

the conveyance of passengers. *Sandiman v. Breach*, 7 Barn. & C. 96.

34. *Bosworth v. Swansey*, 10 Met. 363; *Stanton v. The Railroad*, 14 Allen, 485; *Connolly v. Boston*, 117 Mass. 64; *McDonnell v. The Railroad Corporation*, 115 Mass. 564; *Feital v. Railroad Co.*, 109 Mass. 398; *Bucher v. Railroad Co.*, 131 Mass. 156; *Wallace v. Navigation Co.*, 134 Mass. 95; *Davis v. Somerville*, 128 Mass. 594.

35. *Bryant v. Biddeford*, 39 Me. 193. See, also, *Sullivan v. Railroad Co.*, 82 Me. 196; *Buck v. Biddeford*, 82 Me. 433.

36. *Holcomb v. Danby*, 51 Vt. 428.

37. Statute 1884, ch. 37. *Read v. Railroad Co.*, 140 Mass. 199.

32. *Railroad v. Towboat Co.*, 23 How. 209.

33. The English statute of 7 & 8 Vic. expressly provides for the running of trains on Sunday for

son would be expected to exercise under like circumstances. He cannot, therefore, remain upon the track as long as he chooses, but must leave it at the earliest practicable opportunity that a reasonably prudent person would ordinarily discover, considering his familiarity with the surrounding locality;³⁸ and if he should fail to do so and in consequence receive an injury, the carrier would not be liable unless such injury was wilfully or wantonly inflicted. And if the passenger is negligently carried beyond his destination and is permitted to alight at the next station beyond, it would be negligence for him to attempt to return by way of the railway track; and the company would not be liable for an injury received where such injury was not wilfully or wantonly inflicted.³⁹ But where a female passenger was wrongfully ejected from the train at a station where there were but few conveniences and only a box car which could be used for shelter, and she undertook to return by foot to the place from which she had started and was caught in a storm, the exposure resulting in sickness, it was held that, under the circumstances, she was not as a matter of law chargeable with negligence in attempting to return by foot to the place where she had taken the train. "She was in no fault herself," said the court, "in being put from the train, and being thus put into a position of embarrassment and difficulty, she was not bound to use the best judgment, but only good faith and reasonable prudence. If her return on foot was a natural and reasonable thing to do under the circumstances, then it was a course of action which the defendant should have foreseen, and the consequences which attended the effort were not too remote to enter into computation of damages."⁴⁰

Sec. 1235. (§ 673.) Whether the negligence of the passenger's carrier is to be imputed to him when injured by the concurrent negligence of another—The former English rule of *Thorogood v. Bryan*.—It was formerly the law of England that

38. *Ham v. Canal Co.*, 155 Penn. St. 548, 26 Atl. Rep. 757.

39. *Benson v. The Railroad*, 98 Cal. 45, 32 Pac. Rep. 809.

40. *Malone v. The Railroad*, 152 Penn. St. 390, 25 Atl. Rep. 638.

if both of two carriers are guilty of negligence which causes an accident, the passenger of one of them who suffers an injury thereby is so far identified with him that he cannot maintain an action against the other. This was first decided in the case of *Thorogood v. Bryan*, by the court of common pleas,⁴¹ which was the case of a passenger in an omnibus injured by another omnibus, the drivers of both having contributed to the accident by their negligence. He brought his action for damages against the proprietor of the one in which he was not a passenger, but it was held that he could not recover. "In the present case," said Coltman, J., "the negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is traveling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury." But the law, as thus stated, has not been received with universal approbation, and is said not to bear the test of reason. The only ground upon which it can be claimed to rest is, that the passenger in making his selection of his conveyance makes the carrier his agent, and in the character of principal becomes responsible for his acts, a position which is wholly untenable. The carrier, neither of goods nor of passengers, is the agent of those who employ him. He is in no wise under the control of his employer, nor is the latter responsible for his acts. If he were, he might be held liable for the consequences of his negligence to others, which has never been claimed; and identifying the employer with his carrier in a case where there is mutual fault in causing an accident, amounts in effect to subjecting him to such liability.⁴²

41. 8 Com. B. 115.

42. *Bennett v. The Railroad*, 36 N. J. 225.

Sec. 1236. (§ 674.) Same subject—The English rule generally denied in the United States.—The law of this case was also very decidedly disapproved by the court of appeals of New York, in several cases which have come before it directly involving the question whether, when a passenger upon the train of a railway company was injured by a collision with the train of another road, the employees of both companies being in fault, the passenger was so far identified with the company by which he was being carried that he could not maintain an action against the other.⁴³ In one of these cases⁴⁴ it was said by the court to be “entirely plain that the plaintiff had no control, management, even no advisory power, over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception, which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice.” The supreme courts of many other states have likewise refused to identify the passenger with his carrier so far as to make him a sharer in that carrier’s negligence, and in several cases have allowed actions to be maintained without regard to the fact that his own carrier contributed by his negligence to cause him the injury.⁴⁵ The rule has, however, been approved in Pennsylvania.⁴⁶

43. *Chapman v. The Railroad*, 19 N. Y. 341; *Colegrove v. The Railroad*, 20 *id.* 492; *Webster v. The Railroad*, 38 *id.* 260; *Barrett v. The Railroad*, 45 *id.* 628. And see *Robinson v. The Railroad*, 65 Barb. 146, 66 N. Y. 11; *Dyer v. Railway Co.*, 71 N. Y. 228.

44. *Chapman v. The Railroad*, *supra*.

45. *United States: Little v. Hackett*, 116 U. S. 366.

Alabama: Otis v. Thom, 23 Ala. 469.

Arkansas: Railroad Co. v. Harrell, 58 Ark. 454, 25 S. W. Rep. 117.

California: Hillman v. Newington, 57 Cal. 56; *Thompkins v. Railroad Co.*, 66 Cal. 163.

Illinois: Wabash, etc. R. Co. v. Shacklet, 105 Ill. 364; *Sandon v. The Railway*, 92 Ill. App. 216; *Buckler v. City of Newman*, 116 Ill. App. 546.

Indiana: Albion v. Hetrick, 90 Ind. 545; *Knightstown v. Musgrove*, 116 Ind. 121; *Frank Bird*

Sec. 1237. (§ 675.) Same subject—English criticism of the rule.—Other unfavorable criticisms were made upon the rule of the identification of the passenger with the carrier in such cases, and it was very pertinently said that “if two drunken stage-coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, seems to be the result of the decision in *Thorogood v. Bryan*. . . . Why, in this particular case, both the wrong-doers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood v. Bryan*.”⁴⁷

Sec. 1238. (§ 676.) Same subject—Final overthrow of the rule in England.—The rule of *Thorogood v. Bryan*, however,

Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. Rep. 309.

Iowa: *Nesbit v. Garner*, 75 Iowa, 314.

Kentucky: *Danville, etc. Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, etc. R. R. v. Case*, 9 Bush, 728; *Packet Co. v. Mulligan*, 25 Ky. Law Rep. 1287, 77 S. W. Rep. 704.

Maine: *Barnes v. Inhabitants of Rumford*, 96 Me. 315, 52 Atl. Rep. 844.

Maryland: *Philadelphia, etc. R. Co. v. Hogeland*, 66 Md. 149.

Michigan: *Cuddy v. Horn*, 46 Mich. 596 (*Lake Shore R’y Co. v. Miller*, 25 Mich. 274, is not followed); *Malmster v. R. R. Co.*, 49 Mich. 94.

Minnesota: *Flaherty v. Railway Co.*, 39 Minn. 328; *Follman v. Mankato*, 35 Minn. 522.

Missouri: *Becker v. The Railway*, 102 Mo. 544, 13 S. W. Rep. 1053.

New Jersey: *Bennett v. R. Co.*, 36 N. J. L. 225; *New York, etc. R. Co. v. Steinbreuner*, 47 N. J. L. 161.

Ohio: *Covington Transp. Co. v. Kelly*, 36 Ohio St. 86; *St. Clair, etc. R. Co. v. Eadie*, 43 Ohio St. 91.

Texas: *Galveston, etc. R’y Co. v. Kutac*, 72 Tex. 643.

46. *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; *Forks v. King*, 84 Penn. St. 230; *Philadelphia, etc. R. Co. v. Boyer*, 97 Penn. St. 91. But see *Carlisle v. Brisbane*, 113 Penn. St. 544.

47. 1 Smith’s Ld. Cases, 366, note to *Ashby v. White*.

remained the law of England for over forty years,⁴⁸ but in 1888 it yielded to the almost universal disapproval of English-speaking courts, and was finally overruled in the house of lords.⁴⁹

Sec. 1239. (§ 676a.) Summary of the rules upon the subject of this chapter.—The rules governing the questions discussed in this chapter have been well summarized as follows:

1. Where the conduct of the plaintiff has, as a matter of fact, contributed to the accident, but such conduct has not been in a legal sense imprudent or negligent. In such a case the plaintiff may recover from a defendant in fault.

2. Where the conduct of the plaintiff has been negligent or imprudent, but has not contributed to the accident. In such a case the plaintiff may recover from a defendant in fault.

3. Where the conduct of the plaintiff has been negligent and has contributed to the disaster. In such a case the plaintiff cannot recover even though the defendant be in fault.⁵⁰

48. See *Armstrong v. The Railway*, L. R. 10 Exch. 47.

49. *The Bernina*, 12 Prob. Div. 58; *affirmed in Mills v. Armstrong*, 13 App. Cas. 1.

50. *Hanson v. Railway Co.*, 38 La. Ann. 111; *Knight v. Railway Co.*, 23 La. Ann. 462.

CHAPTER XIII.

PASSENGERS' BAGGAGE.

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| <p>§ 1240. Questions discussed in this chapter.</p> <p>1241. Carrier's liability for baggage.</p> <p>1242. What is baggage.</p> <p>1243. Same subject—Is whatever is usually carried as baggage.</p> <p>1244. Same subject—Articles for personal use during, or for ultimate purpose of journey.</p> <p>1245. Same subject—As to value.</p> <p>1246. Various articles held baggage.</p> <p>1247. Same subject—Bedding.</p> <p>1248. Same subject—A broad rule.</p> <p>1249. What is not baggage.</p> <p>1250. Effect of knowingly accepting articles not properly baggage, but which are tendered as such by the passenger.</p> <p>1251. Same subject—Authority of baggage-master to check merchandise as baggage.</p> <p>1252. Same subject—Massachusetts rule as to merchandise.</p> <p>1253. Baggage not limited to articles to be used on journey.</p> <p>1254. Articles appropriate or essential to purpose of journey.</p> <p>1255. The question of baggage, how determined.</p> | <p>§ 1256. Implied authority of baggage-master concerning baggage.</p> <p>1257. Liability when passenger retains possession of baggage.</p> <p>1258. Same subject—English cases—Must be clear that passenger assumes entire control.</p> <p>1259. Same subject—English cases—Question of delivery to carrier.</p> <p>1260. Same subject—English cases—Passenger's contributory negligence.</p> <p>1261. Same subject—Conclusion from last decision.</p> <p>1262. Same subject—English cases—Dissent from earlier authorities.</p> <p>1263. Same subject—English cases—Bergheim <i>v.</i> Railway disapproved.</p> <p>1264. Same subject—General result of American cases.</p> <p>1265. Same subject—Carrier not liable for wearing apparel in present use.</p> <p>1266. Same subject—Carrier liable for baggage retained by passenger in sleeping-car.</p> <p>1267. Same subject—Hand-bag dropped out of window.</p> <p>1268. Liability of carrier by water for baggage taken by the passenger into his stateroom.</p> |
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- § 1269. Same subject—no liability for clothing, money or jewelry in custody of passenger.
1270. Same subject—Nor for any property in exclusive possession of passenger.
1271. Same subject—New York rule as to the responsibility of the carrier by water for baggage taken by passenger into his stateroom.
1272. Same subject—Passenger negligent, carrier not liable.
1273. Sleeping and parlor-car companies.
1274. Owner must be a passenger.
1275. What is contract where baggage not accompanied by owner.
1276. Where baggage is accompanied by a person other than the owner.
1277. Baggage of wife accompanied by husband—of child accompanied by parent.
1278. When passenger need not accompany his baggage.
1279. Baggage when carried as freight.
1280. Passenger lying over—Baggage going on.
1281. Delivery of baggage to carrier.
1282. Liability of carrier for delivering baggage to wrong connecting carrier.
1283. Same subject—Liability of connecting carrier.
1284. Delivery of baggage at destination.
- § 1285. Passenger allowed reasonable time to call for baggage.
1286. What is reasonable time.
1287. Same subject.
1288. Same subject.
1289. Same subject.
1290. Same subject—Dissent from prevailing construction of "reasonable time."
1291. Strict liability of carrier succeeded by that of warehouseman.
1292. Liability for negligence of subsidiary carrier.
1293. Strict liability of carrier preserved where delay is caused by carrier.
1294. Delivery by carrier to transfer company—Delivery by transfer company.
1295. Passenger's right to have baggage delivered at any regular station at which train stops.
1296. Connecting carriers — Through contract.
1297. Contracts limiting liability.
1298. Same subject—Terms of limitation on baggage checks.
1299. Same subject—Terms of limitation on passenger tickets.
1300. Liability for baggage when passenger is carried gratuitously.
1301. Baggage checks.
1302. What a baggage check implies.
1303. The carrier's lien upon baggage.

Sec. 1240. (§ 677.) Questions discussed in this chapter.

Some reference has already been made to the subject of the passenger's baggage, and it has been shown that in its custody and carriage the public carrier incurs the same liability as in the transportation of goods as freight. There are certain questions, however, in regard to it, which could not be appropriately discussed when treating upon the subject of common carriers, such as what will be included or embraced in the term "passengers' baggage,"¹ for which the carrier will incur this extraordinary responsibility; to what extent the passenger may retain the custody of his baggage and yet throw the responsibility for its safety upon the carrier; and what are the duties of the carrier in respect to its delivery, as to which the rule is, in some particulars, somewhat different from that which appertains to the delivery of ordinary freight; and as these questions have an intimate connection with the subject of the carriage of the passenger himself, their consideration has been reserved for this chapter.

Sec. 1241. (§ 678.) Carrier's liability for baggage.—It was formerly held, as we have seen, that the proprietors of public conveyances which carried passengers were not responsible as common carriers for the baggage of passengers, unless a distinct price was paid for its carriage.² But the law is now settled otherwise; and when the carrier contracts for the carriage of the passenger, either expressly or by receiving him upon his conveyance, the carriage of his reasonable and ordinary baggage is regarded as being also undertaken, as incidental to the principal contract, and as equally obligatory upon the carrier. Being, however, merely incidental to the carriage of the passenger, it would be natural to suppose that the obligation and responsibility of the carrier in respect to his baggage would be only co-extensive with the responsibility which he

1. The California code has adopted the English term "luggage," in preference to the American term "baggage." Pfister v. Railroad, 70 Cal. 169.

2. Middleton v. Fowler, 1 Salk, 282; Upshare v. Adee, 1 Comyns, 25; Wolf v. Summers, 2 Camp 631.

incurred for the safety of the passenger, and that his liability, in case of its loss, would depend upon the question of negligence, as does his liability in case of injury to the passenger himself. But it is now too well established to be controverted, that in the carriage of the passenger's baggage the carrier incurs the full responsibility of the common carrier of goods, and becomes an insurer of its safety against every accident which is not the act of God or of the public enemy or the fault of the passenger himself.³

Sec. 1242. (§ 679.) What is baggage.—It is impossible to define with accuracy what will be considered as baggage. It has been said that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passen-

3. *Railroad Co. v. Knight*, 58 N. J. Law, 287, 33 Atl. Rep. 845; *Runyan v. The Railroad*, 61 N. J. Law, 537, 41 Atl. Rep. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284; *Wood v. The Railroad*, 98 Me. 98, 56 Atl. Rep. 457, 99 Am. St. Rep. 339; *McKibbin v. The Railway*, 78 Minn. 232, 80 N. W. Rep. 1052; *Railroad Co. v. State*, 65 Ark. 363, 46 S. W. Rep. 421, 67 Am. St. Rep. 933; *Railroad Co. v. Lillie*, 112 Tenn. 331, 78 S. W. Rep. 1055, 105 Am. St. Rep. 947; *Adger v. The Railway*, 71 S. Car. 213, 50 S. E. Rep. 783; *Ringwalt v. The Railroad*, 45 Neb. 760, 64 N. W. Rep. 219; *Saunders v. The Railway*, 128 Fed. 15, 62 C. C. A. 523. Story on Bail. sec. 499, and authorities there cited. This rule of liability for the passenger's baggage has been for many years the universally accepted law of this country. But as late as 1864, in the case of *Stewart v. The Railway*

Co., 3 Hurl. & C. 135, the proposition that the carrier of the passenger incurred the liability of the common carrier as to his baggage was disputed by Pollock, C. B., and it was said by him that no English case had ever definitely so settled it. But since that time the law has been well established in accordance with the American rule by the cases of *Macrow v. The Railway Co.*, L. R. 6 Q. B. 612; *Great West. R'y Co. v. Goodman*, 12 Com. B. 313; *Marshall v. Railway Co.*, 11 Com. B. 655; *Butcher v. The Railway Co.*, 16 Com. B. 13.

The general adoption of the rule is no doubt attributable to the evident necessity which those who travel are under to carry baggage, and to the fact that the contract to carry baggage was necessary to make the contract to carry the passenger at all advantageous. Nor can there be any hardship or injustice in such a rule, as it is in

gers, which are not, however, designed for any such use, but for other purposes, such as a sale and the like.⁴ But it is evident that that which may be convenient or necessary for one person might not be so for another, or that that which might appropriately and properly be classed as baggage upon one journey, and for one purpose, might not be so for another journey and for another purpose. That which might be necessary for the convenience of a female passenger might not be so for one of the other sex. That which might be a convenience and almost a necessity for a traveler in one condition of life might be superfluous and wholly useless in the case of another whose habits and condition in life were wholly different.⁵ It may be stated generally, therefore, that those articles of personal convenience or necessity which the passenger takes with him, either for his immediate use or the ultimate purpose of the journey, and which are such as persons of like habits and wants usually take with them for such purposes when on similar journeys, will be considered as baggage within the rule of the carrier's liability.⁶

Sec. 1243. (§ 680.) Same subject—Is whatever is usually carried as baggage.—In the case of *Hawkins v. Hoffman*,⁷ in which it was decided that samples of silks, taken with him in

the power of the carrier to charge such a rate for passage as will compensate him for the responsibility he assumes for the safety of the passenger's baggage.

4. Story on Bail. sec. 499.

5. Bishop on Non-Contract Law, sec. 1156.

6. *Railroad Co. v. McGahey*, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *Railroad Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. Rep. 599; *Railroad Co. v. Matthews*, 24 Ky. Law Rep. 1766, 72 S. W. Rep. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846; *Railroad Co. v. Georgia, etc. Insurance*

Co., 85 Miss. 7, 37 So. Rep. 500; *Runyan v. The Railroad*, 61 N. J. Law, 537, 41 Atl. Rep. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284; *Curtis v. The Railroad Co.*, 74 N. Y. 116; *Missouri, etc. R'y Co. v. Meek*, 7 Tex. Ct. Rep. 86, 75 S. W. Rep. 317; *McKibbin v. The Railway*, 78 Minn. 232, 80 N. W. Rep. 1052; *Railroad Co. v. State*, 65 Ark. 363, 46 S. W. Rep. 421, 67 Am. St. Rep. 933; *Saunders v. The Railway*, 128 Fed. 15, 62 C. C. A. 523; *Knieriem v. Railroad Co.*, 96 N. Y. Supp. 602, 109 App. Div. 709.

7. 6 Hill, 586.

his trunk by a merchant's clerk, were not embraced within the meaning of the term baggage, the following language was used by Bronson, J.: "I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing or very little with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule. "And this test, whether the articles claimed as baggage are such as are usually carried as baggage by persons traveling for certain purposes or upon certain kinds of journeys, is one which has been often applied.⁸

Sec. 1244. (§ 681.) Same subject—Articles for personal use during, or for ultimate purpose of, journey.—This question as to what was properly included by the term baggage came before the court of queen's bench in the case of *Macrow v. The Railway Company*,⁹ in which it became necessary to decide whether bedding, in a trunk with which the passenger was traveling, came within its meaning, and the true rule was said by Cockburn, C. J., to be, "that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as per-

8. "What should constitute necessary baggage for a traveler depends very much upon the circumstances of each particular case. The conveniences required for the journey which has been taken, the duration of the absence, as well as the position of the parties, have

considerable to do with it, and all these are to be considered as a question of fact for the decision of the court or jury." Miller, J., in *Curtis v. Railroad Co.*, 74 N. Y. 116.

9. L. R. 6 Q. B. 612.

sonal luggage. This would include not only all articles of apparel, whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage,' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier." . . . "Now though we are far from saying," continued he, "that a pair of sheets or the like, taken by a passenger for his own use on a journey, might not fairly be considered as personal luggage, it appears to us that a quantity of articles of this description, intended, not for the use of the traveler on the journey, but for the use of his household when permanently settled, cannot be held to be so."¹⁰

10. Other portions of the opinion in this case are of sufficient importance to claim attention. "The conveyance of the personal luggage of the passenger," said the learned judge, "being obviously for his convenience, and therefore accessory, as it were, to his conveyance, it may be thought that the liability of the carrier, in respect of the safe conveyance of passenger's luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers, in respect of articles carried as passengers' luggage, is that of carriers of goods

as distinguished from that of carriers of passengers; unless, indeed, where the passenger himself takes personal charge of them, as in *Talley v. Great Western R'y Co.*, L. R. 6 C. P. 44, in which case other considerations arise. On the other hand, the obligation of a railway company or other carrier of passengers to carry the luggage of a passenger being limited to personal luggage, it follows that it is only in respect of what properly falls under the denomination of 'personal luggage,' or has been accepted by the carrier as such, that the liability to carry safely, irrespective of negligence, attaches. It is necessary to state the proposition with this qualification; for

Sec. 1245. (§ 681a.) Same subject—As to value.—In the absence of legislation limiting the responsibility of a carrier, or of reasonable regulations upon the subject by the carrier itself, it cannot be assumed that the general law prescribes any def-

as the limitation, both as to the quantity and the character of the luggage to be carried, is established for the protection of the carrier, it follows that in either respect it may be waived by the latter; and consequently, that if the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence. Thus in the case of *Great Northern R'y Co. v. Shepherd*, 8 Ex. 30, Lord Wensleydale says: 'If the company had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible.' Again he says: 'If the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight, if the company chose to allow a passenger to carry more, they would be liable.'

"In like manner, in *Cahill v. London & Northwestern R'y Co.*, 13 C. B. (N. S.) 818, I expressed

the opinion of the court of exchequer chamber when I said: 'If a railway company, who by their act of parliament are bound or by their regulations profess to carry personal luggage free, choose to take as ordinary luggage that which they know to be merchandise, I quite agree that it is not competent for them, in the event of a loss, to claim exemption from liability on the ground that the article consists of merchandise and not of ordinary luggage. But, on the other hand, if a passenger who knows, or ought to know, that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk.'

"It being clear that the contract on the part of the railway company is to carry personal luggage only, it follows that it is only in respect of what can properly be termed personal luggage that a liability in case of loss in the absence of negligence arises. The difficulty in the present case, as it has been in many others, is to determine what properly comes under the description of ordinary personal luggage. The definition of 'baggage,' which is here a synonym of

inite, fixed limit of the value of baggage, beyond which the carrier is not liable. But the same rule which regulates the kind or quantity of baggage which a passenger may carry controls, whenever its value is in question, and while a very liberal lati-

'luggage,' given in Story on Bail., § 499, namely, 'such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes such as sale and the like,' though it appears to have been approved of by Lord Wensleydale in the case before cited, has been criticised in America, as appears from a note of the editor of the seventh edition of Mr. Justice Story's work, on the ground that what is 'usually' carried by one man differs materially from what is usually carried by another. It seems to us, however, a misapprehension to suppose that Mr. Justice Story intended to say that ordinary passengers' luggage comprehended only that which was common to all passengers. We believe him to have used the term 'usually' relatively to the habits and wants of the different sorts and classes of travelers. In *Phelps v. London & North Western R'y Co.*, 19 C. B. (N. S.) 321, which is an authority binding upon us, the question for the court was whether an attorney, traveling as a passenger on a railway, was entitled to carry with him in his portmanteau, as ordinary luggage, the deeds and documents which were required as evidence on a trial which he was going to attend. The court of com-

mon pleas held that he was not. Erie, C. J., says: 'It is agreed on all hands that it is impossible to draw any well-defined line as to what is and what is not necessary or ordinary luggage for a traveler; that which one traveler would consider indispensable would be deemed superfluous and unnecessary by another. *But the general habits and wants of mankind must be taken to be in the mind of the carrier when he receives a passenger for conveyance.*' This at once illustrates in what sense the word 'usually' is employed by Story, and affords a strong reason why the word 'usual' or the word 'ordinary,' or some word equivalent in effect, should be considered as qualifying the word 'luggage.' The cases of *Cahill v. London & North Western R'y Co.*, 13 C. B. (N. S.) 818; *Great Northern R'y v. Shepherd*, 8 Ex. 30, and *Belfast & Ballymena R'y Co. v. Keys*, 9 H. L. C. 556, establish that articles of merchandise cannot be considered as personal luggage.

"In *Hudston v. Midland R'y Co.*, L. R. 4 Q. B. 366, the point arose in a different manner. The plaintiff there had tendered to the company a spring horse, which he had purchased and was taking home to his children, as part of his baggage. The company refused to receive it unless he paid for the carriage, whereupon he paid the charge, and afterwards brought an action to recover back the sum he had so paid. My brother Lush in

tude is given by the courts to the value of baggage, for the loss of which a passenger may recover, yet this is not unlimited, and is confined to such a quantity and value as passengers, under like circumstances, and in like conditions of life, usually or ordinarily carry for personal use or convenience in traveling.¹¹ Nor is the carrier liable for such unusual articles as the exceptional fancies, habits or idiosyncrasies of particular individuals may prompt them to carry. In one case, however, a Russian woman of rank, of great wealth and high social position, carried in her trunks a large quantity of rare and valuable laces, which she was accustomed to wear upon different dresses when on visits or attending theatres, dinners, balls and receptions. Some of these laces, to the value of \$75,000, were abstracted from her trunks while in the possession of the railroad company. The jury to whom the case was submitted rendered a verdict in her favor for \$10,000 as the value of the missing laces, and this verdict was not disturbed upon an appeal to the supreme court.¹²

Sec. 1246. (§ 682.) Various articles held baggage.—Following out this idea that the baggage of the passenger, so as to impose liability upon the carrier for it as such, includes such

that case observes: 'It is extremely difficult to frame a definition in terms which shall embrace all that is intended to be brought within the regulation, and exclude all that is intended to be excluded. I cannot say that I am satisfied with any of the definitions which have hitherto been given. They have been quite enough for the cases in which they have been pronounced, but it does not appear to me that any of them are perfect.' He then proceeds to say: 'The only definition I can think of, and one which is sufficient for this case, is that the words of the statute describe a class of articles which are ordinarily or usually carried by travel-

ers as their luggage.' He then proceeds to hold that the dimensions and size of this spring horse took it out of this definition."

11. See *Galveston, etc. Ry. Co. v. Fales* (Tex. Civ. App.), 77 S. W. Rep. 234, citing *Hutchinson on Carr.*

12. *New York, etc. Railroad v. Fraloff*, 100 U. S. 24. Field, J., with whom concurred Miller, J., and Strong, J., dissented, on the ground that two hundred and seventy-five yards of lace, claimed by the owner to be worth \$75,000, and found by the jury to be of the value of \$10,000, could not, as a matter of law, be properly considered as baggage of a passenger.

things as will be considered necessary or convenient for his personal wants, in view of the habits and condition of the passenger and of the purposes of the journey, it has been held that it will embrace money *bona fide* carried in the passenger's trunk for traveling expenses and personal use, to an amount not exceeding what a prudent person would deem proper and necessary for that purpose,¹³ but not money beyond that amount or intended for other purposes, such as for purchasing an interest in a business;¹⁴ manuscript books, the property of a student, and necessary to the prosecution of his studies;¹⁵ a reasonable quantity of the tools of a mechanic, carried in his trunk with his clothing;¹⁶ a manuscript "price book" which plaintiff carried about with him in his valise while engaged as

13. *Railway Co. v. Berry*, 60 Ark. 433, 30 S. W. Rep. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501, citing *Hutchinson on Carr.*

And the amount of money which may be thus carried will depend upon the length of the journey, the circumstances and condition of the passenger, and other considerations to be weighed by the jury. The amount will not be limited to what may be barely sufficient to defray the expenses of the journey, but enough may be carried in this way to meet all the contingencies of delays and stoppages or other incidental expenses which the passenger may be required to incur in going and returning, if it be his intention to return, when the object of his journey has been accomplished. In *Fairfax v. Railroad*, 73 N. Y. 167, thirty-nine English sovereigns, worth \$218.40, which had been packed in plaintiff's trunk, were allowed as reasonable baggage. But see *contra*, and that a passenger will not be allowed money as baggage, even

to the amount necessary for traveling expenses, *Hawkins v. Hoffman*, 6 Hill, 586; *Davis v. The Railroad*, 22 Ill. 278; *Jordan v. The Railroad*, 5 Cush. 69; *Orange County Bank v. Brown*, 9 Wend. 85; *Weed v. The Railroad*, 19 *id.* 534; *Doyle v. Kiser*, 6 Ind. 242; *Merrill v. Grinnell*, 30 N. Y. 594; *Johnson v. Stone*, 11 Humph. 419; *Illinois Cent. R. R. v. Copeland*, 24 Ill. 332; *Simon v. Miller*, 7 La. Ann. 360; *M. & T. Bank v. Gordon*, 5 *id.* 64; *Del Valle v. Steamer Richmond*, 27 *id.* 90; *Bomar v. Maxwell*, 9 Humph. 621; *Duffy v. Thompson*, 4 E. D. Smith, 178.

14. *Levins v. The Railroad*, 183 Mass. 175, 66 N. E. Rep. 803, 97 Am. St. Rep. 434.

15. *Hopkins v. Westcott*, 6 Blatchf. 64.

16. *Porter v. Hildebrand*, 14 Penn. St. 129; *Davis v. The Railroad*, 10 How. Pr. 330.

What is a reasonable quantity of tools to carry as baggage is a question for the jury. *Kansas, etc., Railroad v. Morrison*, 34 Kan. 502.

traveling agent in selling goods, and used by him when making sales, to ascertain values;¹⁷ manuscript music used in connection with the business and travels of a theatre company;¹⁸ record books, the property of a nurse, and used by her in her vocation;¹⁹ the surgical instruments of an army surgeon;²⁰ a woman's jewelry, and every article pertaining to her wardrobe that may be necessary or convenient to her in traveling;²¹ a watch carried in the passenger's trunk.²² But if the passenger wears one watch upon his person he will not be allowed to recover for another as baggage.²³ Valuable laces carried in her trunk by a foreign woman of rank;²⁴ dresses and material for dresses for the members of one's family, purchased in a distant city and being taken home by him as baggage in a trunk;²⁵ a case of dueling pistols and one pocket pistol contained in a carpet bag, and not carried for sale or traffic but for the personal use and protection of the passenger;²⁶ an

17. *Gleason v. The Transportation Co.*, 32 Wis. 85; *Staub v. Kendrick*, 121 Ind. 226.

18. *Texas, etc., R'y Co. v. Morrison's Faust Co.*, 20 Tex. Civ. App. 146, 48 S. W. Rep. 1103.

19. *Werner v. Evans*, 94 Ill. App. 328.

20. *Hannibal R. R. v. Swift*, 12 Wall. 262.

21. *McGill v. Rowand*, 3 Penn. St. 451; *Torpey v. Williams*, 3 Daly, 162; *Brooke v. Pickwick*, 4 Bing. 218; *Pettigrew v. Barnum*, 11 Md. 434; *Mauritz v. The Railroad*, 23 Fed. Rep. 765; *Hubbard v. The Railway*, 112 Mo. App. 459, 87 S. W. Rep. 52, citing *Hutchinson on Carr.*; *Railway Co. v. Fales*, — Tex. Civ. App. —, 77 S. W. Rep. 234.

22. *Jones v. Voorhees*, 10 Ohio, 145; *McCormick v. The Railroad Co.*, 4 E. D. Smith, 181; *American Contract Co. v. Cross*, 8 Bush, 472.

But see *contra*, *Bomar v. Maxwell*, *supra*.

23. *Mississippi Cent. R. R. v. Kennedy*, 41 Miss. 671.

24. *Fraloff v. The Railroad*, 10 Blatch. 16. This case was tried a second time and an appeal to the supreme court was affirmed in *New York, etc., Railroad v. Fraloff*, 100 U. S. 24.

25. *Dexter v. The Railroad*, 42 N. Y. 326.

Cloth not yet made into garments, but intended for manufacture into wearing apparel, *held* baggage. *Mauritz v. The Railroad*, 23 Fed. Rep. 765.

26. *Woods v. Devin*, 13 Ill. 746; *Davis v. The Railroad*, 22 Ill. 278. But see *contra*, *Giles v. Fauntleroy*, 13 Md. 126. And he will be allowed only one revolver. He cannot carry two as baggage. *Chicago, etc. R. R. v. Collins*, 56 Ill. 212.

opera glass carried in a trunk with other baggage;²⁷ a camera and its belongings contained in the passenger's trunk;²⁸ a savings bank and contents, two puff boxes, one child's overcoat and one lady's cloak carried in the trunk of a female passenger;²⁹ a servant's livery carried in his portmanteau, although the property in such livery is in the master,³⁰ are baggage. So it has been held that a small quantity of husband's underclothing, being carried by the wife in her trunk to a certain city where the husband was about to establish his business, constituted a part of the wife's baggage.³¹

Sec. 1247. (§ 683.) Same subject—Bedding.—And in *Ouimit v. Henshaw*,³² “a bed, pillows, bolster and bed-quilts belonging to a poor man who is moving with his family” were held to be properly called and considered as baggage. “It is very common for such persons,” it was said, “to take such articles with them as baggage—their poverty makes it necessary, and such things are about all they have that would make baggage. They are not merchandise, are of small value, may be put in a box or trunk like apparel, are frequently of immediate and necessary personal use to the owners, and, both from custom and from a regard to the poverty of such travelers, are often and properly treated as baggage. If the tools of a mechanic or articles of amusement, such as a gun, a pistol and fishing tackle, or of instruction, as books or a lady's jewelry, are properly baggage, because they are us-

A rifle, a revolver, two gold chains, two gold rings and a silver pencil case, *held* baggage. *Bruty v. Railroad*, 32 Up. Can. (Q. B.) 66. A gun. *International, etc., Railway v. Folliard*, 66 Tex. 603.

27. *Toledo, etc., R. R. v. Hammond*, 33 Ind. 379.

A dressing-case and telescope *held* baggage. *Cadwallader v. Railway*, 9 Low. Can. 169.

28. *Atwood v. Mohler*, 108 Ill. App. 416.

29. *Railroad Co. v. Baldwin*, 113

Tenn. 205, 81 S. W. Rep. 599.

30. *Meux v. The Railway*, (1895) 2 Q. B. 387, 64 L. J. Q. B. 657.

31. *Railroad Co. v. Baldwin*, *supra*.

Proper and necessary articles of clothing, purchased by a husband for his wife and child and packed with his own clothing, may be recovered for as baggage by the husband. *Curtis v. Railroad*, 74 N. Y. 116.

32. 35 Vt. 604.

ually carried as such, we think the articles here in question may, both by reason and custom, be included in the same list. The case on this point was, we think, put to the jury with proper instructions."

Sec. 1248. (§ 684.) Same subject—A broad rule.—And in *Parmelee v. Fischer*,³³ the action being for the value of a chest containing "two feather beds and pillows, two coverlets, two bed spreads or blankets, one lady's black silk dress, ten yards of muslin delaine, one cloak, one fur muff, one large woolen shawl, one oilcloth table-cover, one woolen vest, two pairs woolen pantaloons, two frocks or lady's dresses, one umbrella, one pair new calf-skin boots, one German-silver or britannia teapot, one looking-glass, one new double-barreled gun, one set of common dishes, two dozen German-silver spoons, one serving-box, one woolen overcoat, one woolen dress coat, five pairs of stockings and six towels," and the jury having been instructed that, if they found for the plaintiff, "to assess the damages for such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey," and having under this instruction assessed the plaintiff's damages at \$150, the supreme court upon appeal held the instruction to have been right, and refused to disturb the verdict. But this case certainly allows a latitude to the discretion of a jury in determining what shall be baggage within the rule of the carrier's liability, which is unwarranted by any other reported case, unless it be that of *Ouimit v. Henshaw*, *supra*, and of these two cases it may be said that they leave scarcely any limit to what may be regarded as a passenger's baggage.

Sec. 1249. (§ 685.) What is not baggage.—On the other hand, articles of merchandise intended for sale or not designed for the personal use of the passenger, although accepted by the carrier as baggage, will not be considered as such if accepted without knowledge of their true character.¹

33. 22 Ill. 212.

1. *Stoneman v. The Railway*, 52

Thus, samples of merchandise which the passenger takes with him for the purpose of effecting sales;² or sheets of paper carried by an agent in his trunk which relate solely to the business of his principal;³ or money or bank notes carried, not for the purpose of defraying the expenses of the passenger, but for some other purpose;⁴ or jewelry in the passen-

N. Y. 429; *Hellman v. Holladay*, 1 Woolw. 365; *Pardee v. Drew*, 25 Wend. 459; *Collins v. The Railroad*, 10 Cush. 506; *The Great Northern Railway v. Shepherd*, 8 Exch. 30; *Macrow v. The Railway*, L. R. 6 Q. B. 612; *Chicago, etc., R. R. v. Collins*, 56 Ill. 212; *Smith v. The Railroad*, 44 N. H. 325; *Dibble v. Brown*, 12 Ga. 217; *Richards v. Westcott*, 2 Bosw. 589; *Mississippi Cent. R. R. v. Kennedy*, 41 Miss. 671; *Hudston v. The Railway*, L. R. 4 Q. B. 366; *Harris v. The Railway*, L. R. 1 Q. B. Div. 515; *Michigan Cent. R. R. v. Carrow*, 73 Ill. 348; *Strouss v. Railway*, 17 Fed. Rep. 209; *Pennsylvania Company v. Miller*, 35 Ohio St. 541; *Haines v. Railway*, 29 Minn. 160; *Blumenthal v. Railroad*, 79 Me. 550; *Wunsch v. The Railroad*, 62 Fed. 878, *Gurney v. The Railway*, 59 Hun, 625, 14 N. Y. Supp. 321; *Simpson v. The Railroad*, 38 N. Y. Supp. 341, 16 Misc. 613, citing *Hutchinson on Carr.*; *Railroad Co. v. State*, 65 Ark 363, 46 S. W. Rep. 421, 67 Am. St. Rep. 933, citing *Hutchinson on Carr.*; *Rossier v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 1018; *Wm. Arthur Dixon v. Navigation Co.*, Canada Sup. Ct. Cas. (Cameron) 66. The mere fact that merchandise is carried in sample case is not sufficient to charge the carrier with notice that it is not

ordinary baggage. *Rossier v. Railroad Co.*, *supra*.

Where merchandise is accepted by the carrier for transportation which is concealed in such a way that he believes it to be baggage, his liability will be that of a bailee without hire. *Railroad Co. v. Matthews*, 114 Ky. 973, 72 S. W. Rep. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846; *Railroad Co. v. Bowler, etc., Co.*, 63 Ohio St. 274, 58 N. E. Rep. 813. Delivery to the carrier of a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it contains only such articles as are properly classed as baggage. *Railroad Co. v. Matthews*, *supra*.

2. *Cahill v. The Railway*, 13 Com. B. (N. S.) 818; *Chicago, etc., R. R. v. Marcus*, 38 Ill. 219; *Dibble v. Brown*, *supra*; *Stimson v. The Railroad*, 98 Mass. 83; *Strouss v. Railway*, 17 Fed. Rep. 209; *Pennsylvania Company v. Miller*, 35 Ohio St. 541; *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. R. 711, 37 L. Ed. 587.

3. *Railroad Co. v. Georgia, etc., Ins. Co.*, 85 Miss. 7, 37 So. Rep. 500.

4. *Phelps v. The Railway*, 19 Com. B. (N. S.) 321; *Dunlap v. Steamboat Co.*, 98 Mass. 371. In *Pfister v. Railroad*, 70 Cal. 169, a

ger's trunk, purchased by him and intended as presents for his friends, or Masonic regalia, or engravings;⁵ or a sacque and muff and silver napkin rings carried in a gentleman's traveling bag;⁶ or ladies' jewelry carried in the trunk of a male passenger who is traveling alone;⁷ or silverware, such as silver knives, forks and spoons;⁸ or a package of nails or a letter file not to be used by the passenger in accomplishing the purpose of his journey;⁹ or packages containing groceries;¹⁰ or articles of a perishable nature, such as fruit, carried in the passenger's trunk;¹¹ or masquerade costumes carried in a trunk for use at a ball;¹² or stage properties, paraphernalia, advertising matter and the like;¹³ or a feather bed not intended for use upon the journey;¹⁴

traveler had in charge \$91,000 in gold coin; *held*, that railroad was right in refusing to let him ride with such an amount of money, as it was not "luggage."

Money carried by the passenger for the purpose of purchasing an interest in a business is not baggage. *Levins v. The Railroad*, 183 Mass. 175, 66 N. E. Rep. 803, 97 Am. St. Rep. 434.

5. *Nevins v. The Steamboat Co.*, 4 Bosw. 225. Books which a female passenger has bought for her husband with money remitted to her for that purpose are not baggage. *Hurwitz v. Packet Co.*, 56 N. Y. Supp. 379.

6. *Chicago, etc. R. R. v. Boyce*, 73 Ill. 510.

7. *Metz v. The Railroad*, 85 Cal. 329, 24 Pac. Rep. 610, 20 Am. St. Rep. 228, 9 L. R. A. 431.

8. *Giles v. Fauntleroy*, 13 Md. 126; *Bell v. Drew*, 4 E. D. Smith, 59; *Pettigrew v. Barnum*, 11 Md. 434.

Statutes, (1903), of Oklahoma provide that luggage may consist of any articles intended for the

use of the passenger while traveling, or for his personal equipment.

Held, that one set of scales, three cleavers, one steel, two steak knives, two skinning knives and two meat saws were not baggage. *Railroad Co. v. Zwirtz*, 13 Okl. 411, 73 Pac. Rep. 941.

9. *Runyan v. The Railroad*, 61 N. J. Law, 537, 41 Atl. Rep. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284.

10. *Railroad Co. v. Bullock*, 60 N. J. Law, 24, 36 Atl. Rep. 773, 37 L. R. A. 417.

11. *Railroad Co. v. Johnson*, 113 Ga. 589, 38 S. E. Rep. 954.

12. *Michigan, etc., R. R. v. Oehm*, 56 Ill. 293.

13. *Oakes v. The Railroad*, 20 Or. 392, 26 Pac. Rep. 230; *Saunders v. The Railway*, 128 Fed. 15, 62 C. C. A. 523.

14. *Conolly v. Warren*, 106 Mass. 146. A silk quilt held not baggage. *St. Louis, etc., Railway v. Hardway*, 17 Bradw. (Ill.) 321. Bedding and bed furnishings, not intended for use on the journey — curtains, table-cloths and covers,

or household goods carried in the passenger's trunk, where the purpose of the journey is to change his place of abode, will not be considered as baggage.¹⁵

Sec. 1250. Effect of knowingly accepting articles not properly baggage, but which are tendered as such by the passenger.—If, however, articles not properly baggage, such as merchandise and the like, are tendered to the carrier as baggage, and he accepts them with knowledge of their true character, he will be liable in case they are lost or injured.¹⁶

books, pictures and albums, not baggage. *Mauritz v. The Railroad*, 23 Fed. Rep. 765.

15. *Railroad Co. v. Baldwin*, 113 Tenn. 205, 81 S. W. Rep. 599.

A bicycle—however common it may be among people to carry bicycles about with them—cannot be said to be carried as luggage in the sense of ordinary personal luggage. *Britten v. The Railway*, (1899) 1 Q. B. 243, 68 L. J. Q. B. 75; *State v. Missouri, etc., R'y Co.*, 71 Mo. App. 385.

16. *Railway Co. v. Bowler, etc. Co.*, 57 Ohio St. 38, 47 N. E. Rep. 1039, 63 Am. St. Rep. 702; *Amory v. The Railroad*, 130 Mich. 404, 90 N. W. Rep. 22; *Salleby v. The Railroad*, 90 N. Y. Supp. 1042, 99 App. Div. 163; *Talcott v. The Railroad*, 159 N. Y. 461, 54 N. E. Rep. 1; *New Orleans, etc. R. Co. v. Shackelford*, — Miss. —, 40 So. Rep. 427; *Charlotte Trouser Co. v. Railway Co.*, — N. Car. —, 51 S. E. Rep. 973. See, also, cases cited under preceding section.

Where a passenger who is ignorant of the rules of the railway company forbidding agents to receive money for transportation as baggage, delivers to the baggage-master more money than the com-

pany is required to transport, and informs the baggage-master of the amount, if he accepts it as baggage, the company will be liable for it as a common carrier. *Railway Co. v. Berry*, 60 Ark 433, 30 S. W. Rep. 764, 46 Am. St. Rep. 212, 28 L. R. A. 501.

If a railway company elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage upon its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common law liability therefor, but because it thereby agrees by special contract for a consideration to be so bound. The elements of such contract are sufficiently satisfied by an acceptance of the package or trunk by the baggage-master for transportation as baggage with knowledge of its contents. *Railroad Co. v. Matthews*, 114 Ky. 973, 24 Ky. Law Rep. 1766, 72 S. W. Rep. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846.

The defendant's station agent "having checked the trunk in question as baggage, with knowledge that it contained jewelry

While it is held by some courts that, by accepting articles as baggage which cannot properly be classed as such, the carrier, if he have knowledge of their true character, assumes with reference to them the liability of a common carrier of merchandise,¹⁷ the weight of authority sustains the view that he thereby undertakes to be responsible for them as baggage.¹⁸ But, whichever view is correct, his liability for

(for sale), and without any concealment practiced by the plaintiff as to the contents of said trunk or the value of the same, the plaintiff is not estopped from demanding full compensation for the trunk and its contents, as though the contents were in fact ordinary baggage and not merchandise." *Jacobs v. Tutt*, 33 Fed. Rep. 412. And in *Minter v. Railroad*, 41 Mo. 503, a piece of carpeting was held baggage where it was received by a baggage-master as such, although no check was given for it, and the baggage-master had express instructions, unknown to the passenger, not to accept such merchandise as baggage. See, also, *Hoeger v. Railway*, 63 Wis. 100. In *Cantling v. The Railroad*, 54 Mo. 385, defendant was held liable for a dog carried in a baggage-car. In this case plaintiff was informed that defendant did not carry dogs in its passenger-cars, and placed the dog in the baggage-master's charge, paying him for his trouble. Defendant held liable for loss of dog, notwithstanding a printed rule to the contrary, which was posted in the various stations, but of which plaintiff had no notice. See, however, *Honeyman v. The Railroad*, 13 Ore. 352, where under about the same state of facts as in the last case the court reached an opposite conclusion. In *Kansas*

City, etc. R. Co. v. Higdon, 94 Ala. 286, 10 So. Rep. 282, 33 Am. St. Rep. 119, 14 L. R. A. 515, it appeared that the carrier had a rule that dogs should be carried in the baggage car on payment of a fee to the baggage-master. The plaintiff was directed to place his dog in the baggage car which he did, but no fee was demanded of him. The plaintiff had no notice of the rule requiring payment of the fee in such cases. On arrival of the train at his destination, he demanded the dog, but the baggage-master refused to deliver it to him unless he paid the fee. This he refused to pay and the dog was carried on to another station where it was lost. *Held*, that the carrier was liable.

17. *Railroad Co. v. Swift*, 12 Wall. 272; *Sloman v. The Railway*, 67 N. Y. 208; *Trimble v. The Railroad*, 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115; *Stoneman v. The Railway*, 52 N. Y. 429.

18. *Railroad Co. v. McGahey*, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *Railroad v. Conklin*, 32 Kan. 55, 3 Pac. Rep. 762; *Minter v. The Railroad*, 41 Mo. 503, *Hoeger v. Railway Co.*, 63 Wis. 100, 23 N. W. Rep. 435; *Butler v. The Railroad*, 3 E. D. Smith, 571; *Railroad Co. v. Berry*, *supra*.

their loss or injury will, in either case, be the same. And although the real character of articles tendered as baggage, but which are not properly such, is not stated to the carrier when he accepts them for carriage, if from the facts and circumstances surrounding their acceptance he ought to know that they are not properly baggage, knowledge on his part of their true character will be presumed, and he will be considered as having assumed the liability of a common carrier.¹⁹ Thus if articles of merchandise, packed in such a way that the carrier can see and must know that they are merchandise, be tendered to him as baggage, and he accepts them for carriage, he will be liable in case they are lost or injured. Whether the circumstances surrounding their acceptance were such that he would be charged with knowledge of their true character will be a question of fact for the jury. But, while the outward appearance of a trunk or closed package which contains merchandise may be such as to indicate the nature of its contents, it is said that this fact will not of itself be sufficient to charge the carrier with knowledge of what it contains.²⁰ Nor is the carrier required under

19. *Great Northern Railway v. Shepherd*, 8 Exch. 30; *Hannibal R. v. Swift*, 12 Wall. 262; *Chicago, etc. Railroad v. Conklin*, 32 Kan. 55; *Haines v. Railway*, 29 Minn. 160; *Ross v. Railroad*, 4 Mo. App. 582 (unreported case); *Waldron v. The Railroad*, 1 Dak. Ter. 336; *Strouss v. Railway*, 17 Fed. Rep. 209; *Mauritz v. The Railroad*, 23 Fed. Rep. 765; *Saunders v. The Railway*, 128 Fed. 15, 162 C. C. A. 523; *Sherlock v. The Railway*, 85 Mo. App. 46; *Railway Co. v. Hochstim*, 67 Ill. App. 514; *Railway Co. v. Rosenthal, etc. Co.*, (Tex. Civ. App.) 29 S. W. Rep. 196; *Railroad Co. v. McGahey*, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *Railroad Co. v. Matthews*, 114 Ky. 973, 72 S. W. Rep. 302, 102 Am. St. Rep. 316, 60 L. R. A. 846.
- But the fact that the passenger is required to pay for the extra weight of his trunk will not be sufficient to charge the carrier with knowledge that the trunk contains other than articles which are properly baggage. *Railroad Co. v. Matthews, supra*.
20. *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; *Gurney v. The Railway*, 37 N. Y. S. R. 155; *aff'd*, on opinion below, 138 N. Y. 638.
- In the case of *Cahill v. The Railway*, 10 Com. B. (N. S.) 154, 13 *id.* 818, it appeared that the plaintiff had taken to a station a box labeled "glass," and had given it to a porter of the company,

such circumstances to make inquiry as to its contents.²¹ If, however, there are other circumstances surrounding its acceptance which tend to inform him of the nature of its contents, evidence of its outward appearance will be admissible as tending to show knowledge on his part.²²

So knowledge on the part of the carrier that a trunk or closed package contained articles of merchandise may be inferred from a general custom in his manner of doing business with the public, or from a particular custom or manner of conducting business with a particular individual.²³ Thus if the carrier has established the custom of receiving as the baggage of commercial travelers trunks which are generally known to contain articles of merchandise, belonging not to the travelers but to their employers, he will be held to assume with reference to such merchandise the responsi-

who placed it in the luggage van. In the course of the journey it was lost, and the plaintiff brought an action to recover its value. The box contained merchandise and not passenger's baggage, although the plaintiff was traveling with it as baggage. But it was contended on the part of the plaintiff that the fact the box was labeled "glass" was enough to indicate to the defendants that it contained merchandise, and that as they accepted it without further charge, they were responsible; but judgment was given for the defendants. "It seems to me," said Erle, C. J., in substance, "that it would be introducing a rule most pernicious to public convenience that a railway company, to avoid being fixed with liability, which, according to their regulations they do not intend to take, should be bound to make inquiries where a package is brought which appears likely to

contain merchandise, and if they do not make those inquiries, that they should be taken to know the contents of such packages."

21. *Cahill v. The Railway*, *supra*; *Haines v. The Railroad*, 29 Minn. 160, 12 N. W. Rep. 447, 43 Am. Rep. 199; *Penn. Co. v. Miller*, 35 Ohio St. 541.

22. *Sloman v. The Railway*, 67 N. Y. 208; *Talcott v. The Railroad*, 159 N. Y. 461, *Trimble v. The Railroad*, 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115.

23. *Talcott v. The Railroad*, *supra*; *Saunders v. The Railway*, 128 Fed. 15, 62 C. C. A. 523.

A common carrier may, by long acquiescence in allowing small packages of merchandise to be taken on the passenger cars with passengers, be estopped from insisting that such articles are not personal baggage. *Runyan v. The Railroad*, 61 N. J. Law, 537, 41 Atl. Rep. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284.

bility of a common carrier; and if such a trunk be lost or injured, the owner may maintain an action for the damage sustained, although the carrier was not directly informed as to the character of its contents when he accepted it for carriage.²⁴

Sec. 1251. Same subject—Authority of baggage-master to check merchandise as baggage.—The agent of the carrier, whose duty it is to receive and check baggage, will have implied authority to bind the carrier by accepting as baggage, merchandise offered by the passenger for transportation where such agent has been informed or where he knows, or is presumed to know from the circumstances, that it is merchandise.²⁵ But knowledge on the part of such agent, obtained while engaged in a personal transaction with the passenger sometime before his baggage is accepted for transportation, that a valise contains articles of merchandise will not be binding on the carrier, since, to have that effect, the knowledge must have been obtained by the agent while engaged in the usual performance of his duties.²⁶ So if the passenger has notice of a regulation promulgated by a railway company whereby its agents are forbidden to check sample cases as baggage, and he nevertheless induces the baggage-master to check his sample case as baggage, the act of the baggage-master will be deemed to be in violation of his authority and not binding on the carrier unless a waiver of the regulation can be shown.²⁷ And where the only authority

24. *McKibbin v. The Railway*, 78 Minn. 232, 80 N. W. Rep. 1052; *Amory v. The Railroad*, 130 Mich. 404, 90 N. W. Rep. 22.

In *Sloman v. The Railway Co.*, *supra*, a recovery was authorized by the owner of merchandise where the agreement for the transportation of a sample trunk, in which the merchandise was being carried, was made by his traveling salesman.

25. *Trimble v. The Railroad*, 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115; *Talcott v. The Railroad*, 159 N. Y. 461, 54 N. E. Rep. 1; *Saleeby v. The Railroad*, 90 N. Y. Supp. 1042, 99 App. Div. 163.

26. *Railway Co. v. Joseph*, 125 Ala. 313, 28 So. Rep. 35.

27. *Weber Co. v. The Railway Co.*, 113 Iowa, 188, 84 N. W. Rep. 1042; *s. c.* 92 Iowa, 364, 60 N. W. Rep. 637.

given by a railroad company to the baggage-master of a connecting road is to check baggage to different stations on its line of road, no presumption will arise therefrom that such agent has implied authority to check merchandise over its road under the guise of baggage; and knowledge on the part of such agent that the passenger's trunk contains merchandise, will not be sufficient to charge the railroad company with knowledge.²⁸

Sec. 1252. (§ 685a.) Same subject—Massachusetts rule as to merchandise.—A less liberal construction of the rule concerning the liability of carriers for merchandise carried as baggage than that just discussed, seems to prevail in Massachusetts. It has been held in that State that since the ordinary contract made by the carrier with the passenger, by the sale and purchase of a passenger ticket, is only for the transportation of the passenger and his reasonable, personal baggage, in order to extend the carrier's liability, so as to make it include merchandise also, there must be clear proof of a special agreement to that effect; and notice to the baggage-master that the trunks of a passenger, offered and accepted for carriage, contained merchandise, or evidence tending to show that the baggage-master knew or supposed that they contained merchandise, and that he accepted and checked them as baggage, will not warrant a jury in finding that the carrier agreed to transport the passenger's merchandise as baggage. It would seem that this is substantially holding that a baggage-master has no implied authority, from the nature of his occupation, to bind his company by a special agreement to carry upon its passenger trains, as baggage, the merchandise of a passenger.²⁹ This rule is not supported by the majority of cases.

Sec. 1253. (§ 686.) Baggage not limited to articles to be used on journey.—It will be at once seen from these exam-

²⁸. *Railroad Co. v. Bowler*, etc. Co., 63 Ohio St. 274, 58 N. E. Rep. 813.

²⁹. *Alling v. Railroad*, 126 Mass. 121; *Blumantle v. Railroad*, 127 Mass. 322. In the latter case plain-

ples that it is not necessary, to constitute baggage, that the articles which are being carried as such should be intended for the use, comfort or convenience of the passenger on his journey, and that the liability of the carrier will not be limited to such apparel or other articles as might be used or needed by the way. If they be such as are usually and customarily carried by travelers in their baggage, such, for instance, as a reasonable amount of wearing apparel, or of those common conveniences of life which every one who travels may be supposed to possess, and may reasonably take with him upon a journey, the carrier will be liable for them as baggage, though the passenger might not have expected to use them whilst upon his travel. Hence, wearing apparel, and such things as pertain thereto, being generally the principal constituent of the baggage of passengers, will be treated as baggage, even though purchased and carried for future use, and even when intended for other members of the passenger's family.³⁰ So the tools of a mechanic, when reasonable in

tiff admitted that nothing was said to defendant as to what the package in question contained, "but, for the purpose of showing that the baggage-master, when receiving and checking the same, knew its contents," "plaintiff offered evidence tending to show that from the manner of tying up the bundle some of its contents were visible; that it appeared to be a peddler's package; that the baggage-master then said to him: 'You will make lots of money, there are lots of peddlers.'" Defendant's baggage-masters were forbidden to receive merchandise as baggage, but plaintiff did not know this. Defendant requested the trial judge to rule that even if defendant's servants, who received and checked plaintiff's packages, knew that they contained mer-

chandise, and not personal baggage, defendant would be liable only as a gratuitous bailee. This the court refused, but instructed the jury that if plaintiff was ignorant of defendant's baggage regulations, and the baggage-master, knowing that the lost package was not personal baggage, received and checked it as such, defendant was liable for its loss, to the same extent as if it had been personal baggage. The supreme court held this to be erroneous, saying: "There was no evidence . . . that the baggage-master had any authority to receive freight on a passenger train, or to bind the corporation to carry merchandise as personal baggage."

30. *Dexter v. The Railroad*, 42 N. Y. 326; *Curtis v. The Railroad*, 74 N. Y. 116; *Railroad Co. v.*

quantity, and of a character which such mechanics usually carry for their personal use at destination, will be considered as baggage.³¹

Sec. 1254. (§ 687.) Articles appropriate or essential to purpose of journey, baggage.—So, although the articles which the passenger may claim as baggage may not be such as are usually carried by passengers as personal baggage, and may indeed be but rarely carried with the traveler, and may be wholly useless to him for the purposes of comfort or convenience on the journey, yet if they be such as are appropriate or essential to the purposes of the journey, whether it be for pleasure or for business, they may be considered as baggage, and the carrier may be held responsible for them as such; as in the case of the gun or the fishing apparatus of the sportsman, so often referred to in cases upon this subject as baggage under such circumstances, “the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying.”³²

Sec. 1255. (§ 688.) The question of baggage, how determined.—When the facts are agreed or undisputed, the question, what is baggage, is one strictly of law and must be determined by the court.³³ What constitutes baggage, in any given or supposed case, is a question which depends upon principles of law upon which the courts have agreed with great unanimity, whatever discrepancies there may be in decisions; and although it is said in many of the cases to which reference has been made, that the question is one for a

Baldwin, 113 Tenn. 205, 81 S. W. Rep. 599.

31. Missouri, etc. R’y Co. v. Meek, 7 Tex. Ct. Rep. 86, 75 S. W. Rep. 317, citing Hutchinson on Carr.; Porter v. Hildebrand, 14 Penn. St. 129; Davis v. The Railroad, 10 How. Pr. 330.

32. Macrow v. The Railway, L. R. 6 Q. B. 612; Hawkins v. Hoffman, 6 Hill, 586; Merrill v. Grinnell, 30 N. Y. 619; Hopkins v. Westcott, 6 Blatch. 64.

33. Connolly v. Warren, 106 Mass. 146; Kansas, etc. Railroad v. Morrison, 34 Kan. 502.

jury, it must be understood that this is the case only when there is uncertainty or dispute as to some fact upon which the whole question may turn; as, for instance, what is a reasonable quantity of baggage for which the carrier should be held liable under the circumstances, what amount of money it was reasonable and proper for the passenger to carry as baggage for the purposes of his journey, his rank, habits and condition in life, all of which, as we have seen, may become material in determining the liability of the carrier.³⁴ Such questions are, of course, for a jury, under proper instructions as to the rules by which it is to be determined, whether that which is claimed as baggage is so or not.

Sec. 1256. (§ 688a.) Implied authority of baggage-master concerning baggage.—The authority of a baggage-master, like that of any other agent, may be implied from the nature of his official position and the ordinary duties which belong to it. This implied authority has been well defined by Andrews, J.,³⁵ as follows: “The contract to carry the baggage of passengers, as incident to the contract to carry the person, does not become defined as to particular baggage, its amount or other incidents, until the baggage is delivered to the baggage-master. So also in respect to checking baggage, the arrangement,

34. See *Galveston, etc. R'y Co. v. Fales*, (Tex. Civ. App.) 77 S. W. Rep. 234, citing *Hutchinson on Carr.*

Whether or not a shotgun, carried by the passenger in his valise for the purpose of hunting, is baggage, is a question for the jury. *Railway Co. v. Record*, — Ark. —, 85 S. W. Rep. 421.

The question whether articles carried as baggage exceed in value those articles usually taken by passengers of like station in life is one for the jury. *Bonner v. Blum*, (Tex. Civ. App.) 25 S. W. Rep. 60.

The court may charge as a mat-

ter of law that the tools of a mechanic, if reasonable in quantity, and of a character which such mechanics usually carry for their personal use at their destination, are baggage; but the question whether in character, quantity and value they come within the definition of baggage is one which must be determined by the jury. *Missouri, etc. R'y Co. v. Meek*, 7 Tex. Ct. Rep. 86, 75 S. W. Rep. 317.

35. *Isaacson v. The Railroad*, 94 N. Y. 278.

In the absence of special authority, a baggage-master cannot bind the carrier by a contract to carry baggage beyond the terminus

from the nature of the business, must, in large places at least, be made with the baggage-master. . . . The passenger has, we think, the right to assume that the baggage-master possesses the requisite authority to make all ordinary and usual arrangements with passengers in respect to the transportation of baggage. If a question arises as to checking baggage beyond the line of the road receiving it, the practice of the company is presumably known to the baggage-master, and he is practically the only person to whom the inquiry can be addressed. It would produce great inconvenience if it should be held that the baggage-master did not represent the company in respect to the ordinary incidents of baggage transportation. It could not be claimed that a baggage-master, in the absence of special authority, could bind the company by a contract to carry baggage beyond the terminus of the road, or to agree upon special or unusual modes of delivery, as to deliver at a place other than the depot of the company, or (perhaps) to a specified person at the terminus of the route other than the owner. But it is, we think, within the apparent scope of a baggage-master's employment, when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the question and to bind the company by checking it over connecting roads." It has also been held that the baggage-master has implied authority to accept baggage for a reasonable time before the train upon which it is to go departs, or before a ticket is purchased or fare paid by the owner, and this, notwithstanding a regulation to the contrary by the carrier, where the regulation is not known to the passenger.³⁶

Sec. 1257. (§ 689.) Liability when passenger retains possession of baggage.—In the case of the carriage of ordinary goods as freight by the common carrier, as we have seen, there must be an absolute and complete surrender to him of the custody and control of the goods, in order to fix upon him

of its own road. *Mormonstein v. 36. Lake Shore, etc. R'y Co. v. The Railroad*, 34 N. Y. Supp. 97, Foster, 104 Ind. 293.
13 Misc. 32.

the extraordinary common-law liability of an insurer of their safety; and it has been shown that when this is not done, as in the case of the ferry-man, when the owner of the property, after coming upon his boat, continues to retain its custody and management, he cannot be held liable except for the negligence or unskilfulness of himself or his servants, or for the consequences of defects or imperfections in his boat or its appliances.³⁷ This rule, however, has been held not to apply to the case of the baggage of the passenger, who, by some decisions, has been permitted to retain a partial control over his baggage and its use for all the purposes of his journey, and yet to hold the carrier liable for its loss.

Sec. 1258. (§ 690.) Same subject—English cases—Must be clear that passenger assumes entire control.—The subject has received considerable discussion in the English courts. In *Le Conteur v. The Railway Company*,³⁸ the passenger, traveling with a chronometer, went with it to a railway carriage and gave it to a porter of the company, who, in the presence of the passengers, placed it upon the seat of the carriage. They then both left the carriage, the porter to attend to other duties and the passenger to look after the rest of his luggage. The latter was absent a few minutes, and when he returned the chronometer was not to be found. He sued the company for the loss, and the case coming before the queen's bench was commented upon by Cockburn, C. J., substantially as follows: "When the case was first opened, I had imagined that the facts were such as to lead to the necessary inference that the plaintiff had taken possession of the chronometer, withdrawing it from the custody of the company, and himself taking charge of it. My first impression, however, appears to have arisen from a too rapid view of the circumstances. What really took place appears to be this: that, by desire of the plaintiff, the porter of the company placed this article in a carriage, upon a particular seat, which was to be reserved for

37. *Ante*, §§ 67, 128.

38. L. R. 1 Q. B. 54; 6 Best & S. 961.

the plaintiff. I am far from saying that no case can arise in which a passenger having luggage which, by the terms of the contract, the company is bound to convey to the place of destination, can release the company from the care and custody of an article by taking it into his own immediate charge; but I think the circumstances should be very strong to show such an intention on the part of the passenger, and to relieve the company of their ordinary liability. And it is not because a part of the passenger's luggage, which is to be conveyed with him, is, by the mutual consent of the company and himself, placed with him in the carriage in which he travels, that the company are to be considered as released from their ordinary obligations. Nothing could be more inconvenient than that the practice of placing small articles, which it is convenient to the passenger to have about him in the carriage in which he travels, should be discontinued; and if the company were, from the mere fact of articles of this description being placed in a carriage with a passenger, to be at once relieved from the obligation of safe carriage, it would follow that no one who has occasion to leave the carriage temporarily could do so consistently with the safety of his property. I cannot think, therefore, we ought to come to any conclusion which would have the effect of relieving the company as carriers from the obligation to carry safely, which obligation, for general convenience of the public, ought to attach to them. I cannot help thinking, therefore, we ought to require very special circumstances, such, in fact, as would lead irresistibly to the conclusion that the passenger takes such personal control and charge of his property as altogether to give up all hold upon the company, before we say the company, as carriers, are relieved from their liability in case of loss. If, therefore, this case had depended on the question whether or not the company were liable upon the general issue, I should be of opinion that the plaintiff was entitled to recover." All the judges, however, in this case, who gave separate opinions, agreed that the possession of his luggage, retained by the passenger, might be so

complete and exclusive as to relieve the carrier from all responsibility in respect to it.

Sec. 1259. (§ 691.) Same subject—English cases—Question of delivery to carrier.—In *Richards v. The Railway Company*,¹ it was proven that the plaintiff's wife became a passenger upon a railway carriage, and that a dressing-case which she was taking with her was placed in the carriage under the seat, and that on the arrival of the train at her destination, the porters of the company took upon themselves the duty of carrying her luggage from the railway carriage to the hackney carriage, which was to convey her to her residence, and that in this process the dressing-case was lost. The question was whether it had ever been delivered to the company so as to make them responsible for it, and the judges were all of opinion that it had been, and that the plaintiff was entitled to a verdict. "I think," said Wilde, C. J., "it was clearly established that the dressing-case was delivered to the company. The facts are simple. The lady comes to the station in a fly. The dressing-case is put into the carriage to be conveyed to London with her. Nothing is more common. No doubt this might have been done under such circumstances as would discharge the carriers; or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence. Suppose a passenger to get into a carriage, with a pocketbook in his pocket, and, on arriving at the terminus, to take it out of his pocket, and ask a porter to carry it to a cab; it may be that under such circumstances the company would not be responsible if the pocketbook were lost in the transit. Taking the case as denuded of any facts which could warrant any question of fraud being left to the jury, and there being no other circumstances to exonerate the company from the liability which ordinarily attaches to common carriers, it seems to me that the evidence sustains the first count, and that that count discloses a perfectly good cause of action, though accompanied by su-

1. 7 Manning, G. & S., 62 E. Com. L. R. 839.

perfluous and unnecessary matter. The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference.”²

Sec. 1260. (§ 692.) Same subject—English cases—Passenger’s contributory negligence.—But in *Talley v. The Railway Company*,³ the facts were that the passenger’s portmanteau was put into the carriage with him at his request, and the train having stopped at an intermediate station, he got out for refreshment, and upon returning failed to find the carriage in which his portmanteau was, but continued upon the train in another carriage. Upon arrival at the end of his journey the portmanteau was found to have been rifled of a portion of its contents, for the value of which he sued the company. But it was held that he was precluded from a recovery by reason of his own negligence in leaving the portmanteau uncared for after he got into another carriage. “There is great force in the argument,” said Willes, J., “that where articles are placed, with the assent of the passenger, in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier, which is founded on the bailment of the goods to him, and his being intrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them. There is, moreover, a general principle applicable to these as to all bailments, viz., that the bailor shall not be heard to complain of loss occasioned by his own fault; and the loss in this case was so occasioned, and without such fault would not have taken place. In truth, the expression ‘contributory’ negligence, in such a case, is in-

2. And see *Butcher v. The Rail-* Northern R’y *v. Shepherd*, 8 Exch.
way, 16 Com. B. 13, and Great 30.

3. L. R. 6 C. P. 44.

accurate if it imply any negligence on the part of the company, all the negligence having flowed from one source, viz., the conduct of the passenger, and the whole loss having been occasioned thereby. The verdict is that the company's servants were not negligent, and that the passenger was, and that by his negligence he contributed to the loss, the other 'contributory' thereto being the thief, to whom such negligence gave the temptation and the opportunity." It was further said that the portmanteau having been put into the same carriage with the plaintiff at his request, it was an implied term in the contract of carriage, that, in return for the convenience of having his luggage at hand, the passenger should during the journey take such reasonable care of his own property as might be expected from an ordinarily prudent man, and should not by his own negligence expose it to more than the ordinary risk of luggage carried in a passenger carriage, and that the finding of negligence in not using such reasonable care was sustained by the evidence.

Sec. 1261. (§ 693.) Same subject—Conclusion from last decision.—According, therefore, to this decision, it would seem that if the passenger has his baggage placed in such a part of the conveyance upon which he travels that it is in his entire control, and not in the custody or under the control of the carrier, the duty of the carrier is modified, and in case of its loss; occasioned by the want of reasonable care on the part of the owner, the carrier will not be liable unless the loss is attributable to his negligence. The question, therefore, will become one of negligence, and not of his liability as a common carrier according to the strict rule of the common law.⁴

Sec. 1262. (§ 693a.) Same subject—English cases—Dissent from earlier authorities.—In *Berghem v. The Great Eastern Railway Company*,⁵ the plaintiff, after purchasing his ticket, and a few minutes before the train started, requested

4. See *Railroad Co. v. Lillie*, 112 105 Am. St. Rep. 947, which cites *Tenn.* 331, 78 S. W. Rep. 1055, this section.

5. 3 C. P. Div. 221.

the defendant's porter to take charge of his, plaintiff's, baggage and to put it on the train, while he went to a refreshment room. The porter put the baggage on the seat of a compartment the plaintiff was to occupy, and turned the key of the door. When the plaintiff returned the porter unlocked the door, and a bag which had been previously placed in the car was missing. The jury found that the compartment, and not the baggage-car, was the proper place for the bag; that the porter was acting within the scope of his authority as the defendant's servant in taking charge of the bag; that neither the plaintiff nor the defendant had been negligent; and that the bag had been stolen by some unknown person. It was held that the plaintiff could not recover, unless the defendant was liable as a common carrier, and that the defendant was not so liable. That a carrier is not liable as a common carrier or insurer for that portion of a passenger's baggage which is, at his request or with his consent, placed in the same carriage in which he is to travel, and this for the reason that when so placed, the passenger has control over such baggage during the transit, and that the carrier can exercise no control over it whatever as distinct from its control over the train. The cases of *Le Conteur v. The Railway*,⁶ *Butcher v. The Railway*,⁷ and *Richards v. The Railway*,⁸ were dissented from, to the extent that they held a carrier liable as an insurer for the baggage of a passenger carried at his request in the same car with him.⁹ Under such circumstances, however, it was said that the carriers would be liable "as bailees for hire and contractors to carry, and therefore liable for loss or injury caused by negligence, but not otherwise."

6. *Ante*, § 1258.

7. *Ante*, § 1259, note.

8. *Ante*, § 1259.

9. In referring to these cases, Cotton, L. J., said: "These were all cases where the claim against the company was for the loss of articles placed by or at the wish

of a passenger in the carriage in which he traveled or intended to travel. In the first case,"—*Le Conteur v. The Railway*,—"though judges to whose opinion great weight is due expressed themselves in terms which favor the contention that the company is liable, the

Sec. 1263. (§ 693b.) Same subject—English cases—Bergheim v. The Railway disapproved.—After *Bergheim v. The Railway* arose the case of *Bunch v. The Great Western Railway*.¹⁰ Here the plaintiff's wife went to defendant's railway station about forty minutes before the time at which the train by which she intended to travel was to start. She had a bag and two other articles of baggage which a railway porter carried into the station. The two latter articles were properly labeled and were to be put in the baggage-car. The bag, however, she informed the porter, was to be placed in the car with her. The train had not yet arrived at the station, and plaintiff's wife, wishing to meet her husband who was to purchase her ticket, asked the porter if it would be safe to leave the baggage with him, and he replied that it would be. Plaintiff and his wife returned ten minutes afterward and found the bag in question missing. At the trial it was found that defend-

decision was on other grounds in favor of the company, and the opinion expressed by the judges may be explained as suggested by Mr. Justice Willes in *Talley v. Great Western R'y Co.*" (See *ante*, § 1260.) "In the other cases of *Butcher v. The Railway* and *Richards v. The Railway*, the judgments were against the defendants, and were certainly, as it would seem, based on the view that the company were liable as common carriers. In *Butcher v. The Railway*, however, there was some evidence of negligence on the part of the company, and none of these cases were before a court of error. Moreover, in a later case of *Talley v. Great Western R'y Co.*" (See *ante*, § 1262), "the court of common pleas decided that the company was not liable for the loss of a portmanteau placed at the passen-

ger's request in the same carriage with him. In that case the jury had found the plaintiff guilty of negligence, but it was apparently only neglecting to get back into the carriage in which his portmanteau had been placed. In that case Mr. Justice Willes, who delivered the judgment of the court, pointed out the distinctions of fact which exist between luggage carried in the ordinary luggage van under the immediate and exclusive control of the company, and articles placed by a passenger, or at his request, in the carriage wherein he is to travel, and showed that his opinion was that the company are not liable as absolute insurers of articles so placed, but are only liable in the event of negligence of some part of the duty which pertained to them."

10. 17 Q. B. Div. 215.

ant's porter had been negligent in not being in readiness to put the bag into the car on the return of plaintiff's wife, and that defendant was liable for the loss. In the court of appeal this verdict was sustained, one of the judges, Lord Esher, holding that as long as the passenger's baggage, although intended to be taken into the train with the passenger, is in the custody of the porter for the purpose of transit, either at the commencement or the conclusion of the journey, the railway company is a common carrier of it; but where it is put into the car and is partially under the control of the passenger, the railway company is no longer a common carrier, but is liable for negligence only. Lindley, L. J., concurred, but without expressing his opinion as to whether defendant was liable as a common carrier at all, putting his concurrence on the ground that the porter was acting within the scope of his authority and the lower court had found him to be negligent. Another judge dissented.

The case went to the house of lords, where the verdict against the defendant was sustained, Lord Bramwell alone dissenting.¹¹ All of the other lords, however, in their opinions, while admitting that it was unnecessary to do so in this case, expressly dissented from either the reasoning or the conclusion reached in *Bergheim v. The Railway*, Lord Herschell saying: "I have only to add that, although it is not necessary in this case to determine what is the nature of the duty devolving upon a railway company in respect to luggage carried or intended to be carried in the same carriage with the passenger, I am disposed to agree with my learned and noble friends in preferring the view of this duty to be derived from the cases of *Richards v. The Railway* and *Butcher v. The Railway*, to that enunciated in the judgment of the court of appeal in *Bergheim v. The Railway*." While the opinions in the house of lords in *Bunch v. The Railway* are indicative of what they would hold if the question of the carrier's liability for baggage taken by the passenger into the car with him should

11. 13 App. Cas. H. of L. 31.

again arise, yet, as it now stands, their views as expressed are only *dicta*, and the conclusions of the court in *Bergheim v. The Railway* seem to be more in harmony with law and reason.

Sec. 1264. (§ 694.) Same subject.—General result of American cases.—In a number of cases in this country, also, it has become necessary for the courts to decide upon the character and extent of the custody of baggage which the passenger takes with him into the carrier's vehicle; and it may be stated as the general result of these cases that, if the passenger retain in his custody any part of his baggage to the exclusion of the carrier's control over it, the latter can be held liable for its loss only when it has been occasioned by his negligence;¹² and that if the passenger fails to take such reason-

12. Where the baggage remains to some extent at least in the personal custody of the passenger, the carrier can be held liable for its loss only where he has been guilty of negligence. *Holmes v. Steamship Co.*, — N. Y. —, 77 N. E. Rep. 21. The carrier is not liable for the loss of articles carried as baggage unless they are delivered into its care or custody. As to articles carried by the passenger in the same car in which he travels, the burden of proof is on him to show that they were lost through the carrier's negligence. *Kneriem v. Railroad Co.*, 96 N. Y. Supp. 602, 109 App. Div. 709. As to money which the passenger carries in his own custody, the carrier is not liable unless he has been guilty of negligence—and then only for such a sum as is reasonably necessary, in view of all the circumstances, for the journey *Kneriem v. Railroad Co.*, *supra*.

The attempt was made, in the case of *The First National Bank v.*

The Railroad, 20 Ohio St. 259, to hold the railroad company liable for a package of money which the agent of the bank was carrying upon his person, when, by the breaking down of a bridge, the train was wrecked, the agent killed and the money burnt up. But the court held that there was no precedent for an action for the money under such circumstances, and no legal principle upon which it could be maintained. And in *Weeks v. The Railroad*, 9 Hun, 669, the railroad company detached its engine from the car and left it standing upon the track until horses could be brought to move it into their depot, and during the time, and while the car was standing upon the track and unguarded, three men entered it and robbed the plaintiff of \$16,000 in securities which he had upon his person; but it was held that the company could not be held liable. And this case has been affirmed by the court of appeals of New York (72 N. Y. 50).

able care of it as would be expected of a prudent person, and it is in consequence lost, the loss must be borne by him and not by the carrier, as was held in the above case of *Talley v. The Railway Company*.¹³

Sec. 1265. (§ 695.) Same subject—Carrier not liable for wearing apparel in present use.—In a leading case upon the subject, which is often referred to on behalf of the carrier,¹⁴ to support the position that when the passenger retains his baggage in his own custody there is no such delivery to the carrier as is necessary to create the obligation to see to its safety, the facts were that the passenger came upon the car with his overcoat upon his arm, and carelessly threw it down upon his seat. At the end of his trip he left the car, forgetting his coat and leaving it upon the seat, and it was stolen. Upon these facts it was held that the passenger had retained the exclusive control of the coat, and that there had been no delivery to the carrier which could make it responsible. But in deciding the case the court does not seem to have considered the overcoat as baggage, but as a part of the wearing apparel of the passenger in present use; and Nelson, J., in delivering the opinion of the court, seems to have put it upon that ground. “A carrier,” said he, “is not bound to act as a guardian for his passenger and treat him as a ward under age. The passenger must at least assume the responsibility of taking ordinary care of himself, including the wearing apparel about his person.”


Sec. 1266. Same subject—Carrier liable for baggage retained by passenger on sleeping-car.—The question arose in the case of *The Railroad Co. v. Lillie*,¹⁵ whether the railroad

13. Where the passenger negligently left a sum of money on the window sill of the car, and it was stolen by the porter, it was held that the carrier was not liable. *Levins v. The Railroad*, 183 Mass. 175, 66 N. E. Rep. 803, 97 Am. St. Rep. 434.

14. *Tower v. Utica Railroad*, 7 Hill, 47.

15. 112 Tenn. 331, 78 S. W. Rep. 1055, 105 Am. St. Rep. 947. See, also, *Railroad Co. v. Katzenberger*, 16 Lea, 380, 1 S. W. Rep. 44, 57 Am. Rep. 232.

company should be held responsible as an insurer of baggage retained by the passenger while riding in a sleeping-car attached to its train. It appeared that the passenger took his baggage, consisting of a dress suit case, with him into the sleeping-car, and that on retiring for the night he placed the suit case under his berth in the space between the two seats. When the train arrived at his destination the suit case was missing, and no trace of it was afterwards found. It also appeared that there was a baggage-car attached to the train in which the baggage of any or all passengers would have been received. It was held that the railroad company was liable as an insurer for the safety of the baggage and was therefore responsible for its loss. "We are of the opinion," said the court, "that this case turns upon the question whether or not the luggage must be considered as retained in the exclusive custody of the passenger, or as under the control and in the custody of the employees of the sleeping-car company, who are also, under the law, employees of the railroad company as to the custody and safety of luggage. . . . We think that in the case of passengers on day coaches who prefer to keep their baggage, and especially their hand luggage, in their own possession and on the seat with them instead of placing it in the baggage-car, the railroad company should not be held liable as an insurer. There are a large number of day passengers, and they almost invariably carry hand-grips and parcels in their hands, retaining control and custody of them during the entire trip. In such a case the carrier should not be held as an insurer of the safety of the baggage. But does the same rule apply in regard to the baggage of passengers riding in sleeping-cars? The passengers, as a general rule, are going journeys which require, it may be, days and nights to accomplish. They desire superior accommodations and conveniences, and, among them, to be relieved of the care and custody of their luggage except so far as they may desire to use it for their daily purposes. . . . We think it does not matter who brings the luggage upon the car,—whether the passenger or the porter,—nor is it very material where in the car the luggage



is deposited after it is brought in. Unless the passenger shall assume and retain exclusive possession and control of the baggage, and either directly or impliedly deny any right of possession or custody to the employees of the road, the baggage must be considered as being in the possession of the employees of the sleeping-car company who are, at the same time, employees of the railroad company. Especially is this true of luggage and hand baggage that the passenger does not keep about his person, or in his hand, nor take with him when he retires to his berth. If the baggage is deposited under the berth, or over it, or at any other convenient place when the passenger retires for sleep, it must be considered as in the custody of the employees of the road, and the railroad company must be treated as insuring its safety. . . . The article lost, being a suitcase, was not easily susceptible of exclusive custody by the passenger, as might be the case with a small hand grip; and the facts show that it was put in the usual place under the berth when the passenger retired for sleep. . . . The railroad company, under the facts and the law, must be held an insurer of the baggage and responsible for its loss."

Sec. 1267. (§ 697a.) Same subject—Hand-bag dropped out of car window.—In *Henderson v. The Railroad*,¹⁶ a lady of wealth, who was passing over the defendant's railroad, from her summer residence at Pass Christian to her winter home at New Orleans, carried in her hand a leather bag containing money to the amount of \$5,800, and jewelry worth \$4,075. While the plaintiff was closing a window of the car "to stop a fierce current of air which came in upon her," she dropped the bag and its contents out of the window. The conductor was immediately informed of the loss and its value, and he was requested to stop the train, but he refused to do so, and ran three miles further to the next regular station. From this point plaintiff dispatched a trusty person back to where the bag was dropped, but it was never found. The question proposed to the court was the responsibility of a railroad company for the loss of

16. 20 Fed. 430; s. c. 123 U. S. 61.

a valuable parcel, carried in the hand of a passenger, and falling out of an open window, without fault of the carrier, when the carrier, upon notice and demand, refuses to stop its train to recover the parcel. In deciding this question the court held: "That the plaintiff had a right to take into the car with her the bag and its contents, and to carry the same in her hand, or in some other way under her personal supervision and in her personal custody."¹⁷ "There remains, then, the question whether the defendants assumed any responsibility with reference to the valuables, other than that the plaintiff herself should be carried, and that the valuables should not be interfered with by any act or fault of theirs." The court found this contract completely performed by the carrier, and said: "There was no duty to do anything at all towards recovery, unless there had been some violation of the undertaking to carry, and there had been none. . . . The appeal was to a party who was under no legal obligations to aid in the recapture, and stood upon grounds of kindness and Christian charity, to be decided by the person appealed to, by reference to moral and not legal considerations. and, if refused, caused *damnum absque injuria*."

Sec. 1268. Liability of carrier by water for baggage taken by the passenger into his stateroom.—It is held that the carrier by water does not assume, with reference to baggage which the passenger takes with him into his stateroom, the liability of a common carrier. In the case of *The R. E. Lee*,¹⁸ a lady's "companion," having in it, among other things, some jewelry, was left hanging in her stateroom whilst she left it for a short time. When she left the stateroom she closed the door. On her return she found that some one had entered the room and abstracted the jewelry. She sued the steamboat for the loss, but it was held that she could not recover. "The baggage for which the carrier is responsible," said Hill J., "must be such as can with propriety be placed in the baggage room, or must be delivered to the clerk of the boat, or some other

17. Compare *Pfister v. Railroad*, 18. 2 Abb. (U. S.) 49.
70 Cal. 169.

officer authorized to receive it, and not such articles as the passenger necessarily keeps in his possession; such as the hand-bag, or companion stated in this case." So in the case of *The Humboldt*,¹⁹ the passenger placed his valise in his stateroom from which place it was later stolen, and it was held that he could not recover. "A passenger ship," said the court, "is necessarily accessible to all classes of travelers, and is so far a public place that it is unreasonable to impose upon the owners the burden of liability for thefts of the private baggage of passengers, unless the baggage has been delivered to and left in the exclusive control of the carrier's officers or servants." And in the case of *The American Steamship Company v. Bryan*,²⁰ it seems to have been assumed without discussion that the carrier was not responsible for the valise of a passenger, kept with him in his stateroom, unless its loss was due to the carrier's negligence.

Sec. 1269. (§ 696.) Same subject—no liability for clothing, money or jewelry in custody of passenger.—So in the case of *The Steamboat Crystal Palace v. Vanderpool*,²¹ a passenger on retiring to bed took off his watch and breastpin and placed

19. 97 Fed. 656.

20. 83 Penn. St. 446.

A deck passenger, whose baggage is not in his trunk, but in his own possession, cannot hold the ship liable for its loss or damage. *Defrier v. The Nicaragua*, 81 Fed. 745.

21. 16 B. Mon. 302.

In *McKee v. Owen*, 15 Mich. 115, a female passenger occupying a stateroom on a steamer, upon going to bed at night rolled up her dress with her portmonnaie, containing a sum of money in its pocket, and laid it upon the upper berth of the stateroom. During the night the money was stolen through a broken window of the stateroom. She brought an action against the owner of the vessel to

recover for the loss, and the court below instructed the jury that, having retained the money in her possession, she could not recover. The case was taken to the supreme court, and there, the judges being equally divided upon the question, the judgment was affirmed; *Christiancy and Cooley, JJ.*, being of opinion that under these circumstances the carrier was liable as an inkeeper would have been, while *Campbell, J.*, and *Martin, C. J.*, thought differently. The question was ably discussed by *Christiancy and Campbell, JJ.*, on opposing sides, and their arguments are well worthy of attention. And see *Del Valle v. S. Boat Richmond*, 27 La. Ann. 90.

them, together with his money, upon a chair in his stateroom, putting a chair and his baggage against the door, there being no way to fasten it otherwise. During the night these articles were stolen, and he brought an action against the boat and owners for their value, but it was held that he could not recover. "Steamboat owners," said the court, "are regarded as common carriers, and are subject to the well-established principles governing their responsibilities; and we are not aware of any principle by which common carriers can be held responsible for the wearing apparel of the passenger or his money which he carries upon his person, and which is under his own immediate care and control. When such things are made baggage, and are delivered to the owners or their agents, the rule is different, and their responsibility is regulated by the established rules in reference to the baggage of passengers. The fact that the lock was out of order, and that this was made known to a servant, cannot, in our opinion, make the boat responsible as a common carrier,—the plaintiff choosing to retain the articles under his own care instead of delivering them into the care and custody of the officers; especially as the conduct and declarations of the plaintiff were calculated to invite the depredations committed upon him." And in *Clark v. Burns*,²² in which it also appeared that the watch of the passenger had been stolen from his stateroom during the night, it was held that the owners of the vessel were not liable, although the passenger was forbidden by the rules of the boat from fastening or otherwise securing the door of his stateroom. "They would be subject," said the court, "to the liability of common carriers for the baggage of passengers in their custody, and might, perhaps, be so liable for a watch of the passenger locked up in his trunk with other baggage. But a watch worn by a passenger on his person by day and kept within reach for use at night, whether retained upon his person or placed under his pillow or in a pocket of his clothing hanging near him, is not so intrusted to their custody and control as to make them liable for it as common carriers."²³

22. 118 Mass. 275.

23. Where the passenger en-

Sec. 1270. (§ 697.) Same subject—Nor for any property in exclusive possession of passenger.—And so where a sum of money was stolen from the pocket of the passenger while asleep in the berth assigned him by the officers of the boat, it was held that the owners of the boat were not liable for the loss, upon the ground that it was not in their custody as carriers.²⁴ So where a steerage passenger upon a ship, when he went on board, took his trunk with him into the steerage and tied it with ropes to the berth on which he slept, and during the night the ropes were cut and his trunk was stolen by some unknown person, it was held that as the passenger had taken it into his exclusive possession, relying upon his own care and vigilance to protect him against its loss, the owners of the ship were not liable.²⁵

Sec. 1271. (§ 698.) Same subject—New York rule as to the responsibility of carrier by water for baggage taken by passenger into his stateroom.—The courts of New York, however, have taken the view that a ship or steamboat is to be regarded as a floating inn, and the rule has accordingly been laid down that the passenger may take his ordinary baggage into his stateroom for use upon his journey without releasing the carrier from his obligation as a common carrier, if the passenger is guilty of no act of negligence which exposes it to theft.²⁶

deavored to deposit her personal jewelry with the purser of the boat, but failing to so deposit it through no fault of her own, it was stolen from her the first night out, it was held that she was entitled to recover. *The Minnetonka*, 132 Fed. 52.

24. *Abbott v. Bradstreet*, 55 Me. 530.

25. *Cohen v. Frost*, 2 Duer, 335.

26. *Adams v. The Steamboat Co.*, 151 N. Y. 163, 45 N. E. Rep. 369, 56 Am. St. Rep. 616, 34 L. R. A. 682; s. c. 29 N. Y. Supp. 56, 9 Misc. Rep. 25. In this case it was held that the carrier was liable for

money carried by the passenger as traveling expenses which was stolen from his stateroom at night without any negligence on his part. The case also draws a distinction between steamboats and sleeping-cars. The owners of the former are held to be liable as innkeepers, while the owners of the latter are held not to be so liable. See, also, *Hart v. Steamship Co.*, 95 N. Y. Supp. 733, 108 App. Div. 279; *Holmes v. Steamship Co.*, — N. Y. —, 77 N. E. Rep. 21. (In this case it was held that a limitation in the ticket that the ship-owners were not to be liable for

“Granting for compensation the use of a stateroom,” says Brady, J., in *Gore v. The Transportation Company*,²⁷ “in the absence of notice to the contrary, is a designation of the place in which the traveler may put his ordinary baggage, but not to the exclusion of the carrier, inasmuch as the whole vessel is in possession of the carriers and subject to their control. If similarly deposited at an inn, it would be regarded as *infra hospitium*, and, as we have seen, the obligation and duties of carrier and innkeeper have been declared to resemble each other.”²⁸ And upon this ground it was held that the owners of the boat were responsible for the loss of an overcoat which the passenger had locked up in his stateroom, but which, in his temporary absence from it, was stolen. And in *Mudgett v. The Steamboat Company*²⁹ the passenger who had lost a valise from his stateroom under exactly the same circumstances was permitted to recover its value. In both these cases it is said that the mere deposit of the baggage in a stateroom shows no such *animus custodiendi* on the part of the traveler to the exclusion of the carrier as will, in the absence of negligence, shift the responsibility upon the former; and the case of *Cohen v. Frost*,³⁰ so far as it may be considered as holding that a traveler on a sea voyage must place his baggage in the special charge of the officers of the ship in order to fix upon its owners the liability for its loss, is disapproved.³¹

the loss of baggage beyond the sum of \$100, unless a higher value was declared, did not apply to baggage taken by the passenger into his stateroom, but only to that over which the carrier assumed exclusive control.)

27. 2 Daly, 254.

28. *Purvis v. Coleman*, 21 N. Y. 111.

29. 1 Daly, 151.

30. 2 Duer, 355.

31. And see, to the same effect, *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Macklin v. The New*

Jersey Steamboat Co., 7 Abb. Pr. (N. S.) 229; *Hart v. Steamship Co.*, 92 N. Y. Supp. 338; *Lincoln v. Steamship Co.*, 62 N. Y. Supp. 1085, 30 Misc. Rep. 752.

In *De Felice v. Compagnie Francaise de Navigation*, 82 N. Y. Supp. 552, 83 App. Div. 73, an officer on the ship violently seized the passenger's personal baggage and threw it into the sea. *Held*, that the carrier was liable.

In *Crozier v. Steamboat Co.*, 43 How. Pr. 466, the plaintiff retired in a stateroom of defendant's boat,

Sec. 1272. (§ 699.) Same subject—Passenger negligent, carrier not liable.—But where the passenger, having taken his baggage into his stateroom, is chargeable with negligence to which the loss can be ascribed, the carrier cannot be held liable. In *Gleason v. Goodrich Trans. Co.*¹ it was proven that the plaintiff paid for a passenger's ticket on the steamboat, and asked for the key of his stateroom that he might put his valise in it, but was informed that there was no key, and that the room was not locked. He then put his valise in it, and, calling the attention of some of the cabin boys to the fact, asked if they thought it would be safe. He then went to another part of the boat, and after an absence of some three-

and was robbed during the night of his watch, chain and pocket-book. The case was tried before Mr. James C. Carter, *referee*, who distinguished between the liability of carriers generally for baggage of which the passenger retains the custody and the liability of a steamboat with staterooms. This learned gentleman, referring to the case of a passenger occupying a stateroom on a steamboat, says: "In such a case the passenger is invited, upon the payment of a consideration, to disrobe himself and retire to a couch to sleep; in other words, he is invited to throw aside all the vigilance and precaution which men habitually practice when awake, and to intrust his person, and whatever men usually carry about their persons, to the care and vigilance which, it must be presumed, they who extend the invitation and receive the reward for the comfort thus afforded will themselves exercise. . . . Nor can it be in the contemplation of either carrier or passenger that the latter should make a special deposit of his

pocket-money or articles usually carried about his person before retiring to rest. As well might we suppose that it was in contemplation that the passenger should deliver the clothes he takes off into the special custody of the carrier.

. . . The rule of law applicable to such a case I think to be this: that if any of the articles or money which the passenger properly has with him in his stateroom is stolen, the presumption is that the theft was in consequence of the default of the carrier; and that this presumption can be repelled only by proof that the loss was attributable to the negligence or fraud of the passenger, or to the act of God or of the public enemy." This was affirmed on appeal.

1. 32 Wis. 85.

It is not negligence for a passenger to carry a gold watch, gold pen and pencil, and his railroad tickets to his berth on a steamer and place them under his pillow, from which place they are stolen. *Dunn v. The Steamboat Co.*, 58 Hun, 461, 12 N. Y. Supp. 406.

quarters of an hour he returned to the stateroom, and discovered that his valise was gone. He sued the company for the loss, but it was held that he could not recover, his own fault in putting his valise in the stateroom, under the circumstances, having contributed to the loss. But it was admitted that, had the valise been in a locked stateroom when stolen, the law would have been different.²

Sec. 1273. (§ 700a.) Sleeping and parlor-car companies.—

As stated in a previous chapter,³ it is now well settled that sleeping and parlor-car companies are not subject to the same liabilities for the baggage of passengers lost or damaged as are common carriers. Neither are they liable as innkeepers. When, however, such companies fail to exercise reasonable care and watchfulness in the protection of personal baggage, and the passenger sustains a loss thereby, they are liable for such loss. But the liability of the company would, of course, be limited to such articles as are properly included in the term baggage. And contributory negligence on the part of the passenger would defeat his recovery. The fact however, that a passenger is riding on a car, owned and controlled by a sleeping or palace-car company, but attached to the train of a railroad company, does not relieve such company from its liability as a

2. It also appeared in this case that there was on the boat a baggageman, who gave checks for baggage and kept it for passengers; but this seems not to have been regarded as material, as it was admitted that had the stateroom been locked the company would have been liable. But *quære* would not an innkeeper have been liable under these circumstances? It is true that carriers of passengers by boats are not innkeepers, but the nature of their liability is so similar that we may fairly reason by analogy as to their obligations and liabilities in respect to the property intrusted to them.

They are said to be so nearly the same that the distinction is not of much moment. *Hulett v. Swift*, 33 N. Y. 571; *Purvis v. Coleman*, 21 *id.* 111, and the cases *supra*, *Mudgett v. The Steamboat Co.* and *Gore v. Trans. Co.* The passenger had the right to his valise in his stateroom, as admitted, and though it might not have been altogether prudent to leave it there under the circumstances, the reason why it was not locked up in the stateroom was, that there was no key, which was the fault of the boat.

3. *Ante*, ch. XI.

common carrier to the passenger, the same as if such passenger were riding upon a car belonging to the railroad company.⁴

Sec. 1274. (§ 701.) Owner must be a passenger.—The owner of the property must, of course, stand in the relation of passenger to the carrier in order to fix upon him liability as a carrier of baggage. The carriage is *ex vi termini* incidental to the carriage of the owner as a passenger. If, therefore, that which would have been properly baggage had it been accompanied by the owner as a passenger, should, by accident or mistake, be accepted by the carrier for transportation without being accompanied by the owner, and when he is not or does not become a passenger, the carrier would not have it in his custody in the character of baggage, and would not be responsible for it as such.⁵ Of course if he accepted such baggage for transportation, knowing that the owner was not and did not intend to become a passenger, he would accept it to be carried as freight, and would be liable for it as a common carrier of goods. But if he accepted it as baggage, supposing the owner to be a passenger, or about to become one, and it should turn out that he was not and did not become a passenger upon the journey upon which the goods were taken, the question would arise: In what character and under what responsibilities was it carried?

Sec. 1275. (§ 702.) What is contract where baggage not accompanied by owner.—Having accepted it to be carried as

4. *Ante*, § 1135.

5. *The Elvira Harbeck*, 2 Blatch. 336; *Collins v. The Railroad*, 10 Cush. 506; *Fairfax v. The Railroad*, 37 N. Y. S. C. 516, and 40 *id.* 128; *s. c.* 67 N. Y. 11; *Marshall v. The Railroad*, 126 Mich. 45, 85 N. W. Rep. 242, 55 L. R. A. 650; *Beers v. The Railroad*, 67 Conn. 417, 34 Atl. Rep. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535; *Wood v. The Railroad*, 98 Me. 98, 56 Atl. Rep. 457, 99 Am. St. Rep.

339; *Railway Co v. Clark*, 52 Kan.

398, 34 Pac. Rep. 1054, citing *Hutchinson on Carr.*

In *Little Rock, etc., Railway v. Hunter*, 42 Ark. 200, it was held that, when goods are left with a railroad company's agent, to be kept at the depot until the owner should be prepared to proceed on his journey, and to be returned on request if he should not go, the carrier becomes a mere gratuitous bailee, provided the agent can bind

baggage, will the law imply or impose upon him a different contract or duty from that which he undertook? For although the measure of the liability of the carrier of the baggage is the same as that of the common carrier of goods as freight, the risk incurred by the carrier in the two cases is not always the same. When the baggage is accompanied by the owner, as the carrier has the right to suppose will be the case, emergencies may arise in which his care and attention to it may preserve it from loss; and when his journey has been safely made, the carrier may at once deliver to him his baggage, instead of being obliged to keep it for him and thereby prolong his own responsibility. Therefore, to make him responsible as a common carrier of freight for that which he has accepted for carriage as baggage, would be imposing upon him a somewhat different undertaking from that to which he had agreed. In the case of *Collins v. The Railroad*,⁶ when the goods were offered as baggage, the agent of the carrier inquired whether the owner intended to accompany them, and was answered that he did, whereupon he accepted them. The owner, however, did not go upon the same train with the goods, but upon a subsequent one; and before he reached the destination to which the goods had been carried, they had been stolen. It was held that the carrier was not liable for their loss. "It is easy to perceive," said the court, "that the omission of the plaintiff to accompany them, as he informed defendant's agent he should, contributed materially to the loss; and that what might have been a very proper and suitable disposition of them at the station at Lawrence, under the reasonable belief that the owner of them was

it at all under such circumstances. See, also, *Illinois, etc., Railroad v. Tronstine* 64 Miss. 834.

6. 10 Cush. 506. See, also, *Tewes v. Steamship Co.*, 85 N. Y. Supp. 994, 89 App. Div. 148; *Wood v. The Railroad*, 98 Me. 98, 56 Atl. Rep. 457, 99 Am. St. Rep. 339.

A person who purchases a ticket merely for the purpose of having

his trunk checked as baggage, and who accordingly does not accompany the same upon the journey upon which it is taken, cannot hold the carrier responsible for it as a common carrier of baggage. *Marshall v. The Railroad*, 126 Mich. 45, 85 S. W. Rep. 242, 55 L. R. A. 650.

present to take charge of them, might have been one of hazard and exposure to loss in his absence." Where, therefore, the owner of goods, who has secured the right to be carried as a passenger, tenders his goods as baggage, and the carrier, believing that they are to be accompanied by him, accepts them as such, he will thereby incur with respect to their safety the responsibility of a gratuitous bailee only if, through no fault of his, the owner does not become a passenger upon the journey upon which they are taken.⁷ And if the carrier should receive goods as baggage under circumstances which lead him to suppose that their owner has secured the right to be carried as a passenger, when in fact no such right has been or is intended to be acquired, the only duty, it is held, which the carrier would owe the owner would be to abstain from wilfully or wantonly causing them injury.⁸

Sec. 1276. Where baggage is accompanied by a person other than the owner.—Since the carriage of baggage is incidental to the contract for the transportation of the passenger, it follows that if the property accepted by the carrier as the personal baggage of the passenger does not belong to him, but to another with whom no contract for transportation has been made, the owner, in the absence of proof that the carrier has been guilty of negligence, cannot recover for its loss or injury.⁹ And although property not owned by the passenger, but accepted by the carrier as his personal baggage, has been lost or injured through some negligent act on the part of the carrier, if such property did not constitute, or was not properly a part of the personal baggage of the passenger, the carrier would not be liable to the owner, since he could not be charged with liability for property which, had he been informed of its

7. *Marshall v. The Railroad, supra*; *Wood v. The Railroad, supra*.

8. *Beers v. The Railroad*, 67 Conn. 417, 34 Atl. Rep. 541, 52 Am. St. Rep. 293, 32 L. R. A. 535.

9. *Railroad Co. v. Knight*, 58 N. J. Law (29 Vroom) 287, 33 Atl.

Rep. 845, citing *Weed v. The Railroad*, 19 Wend. 554; *Stimson v. The Railroad*, 98 Mass. 83; *Dunlap v. The Steamboat Co.*, *id.* 371; *Alling v. The Railroad*, 126 Mass.

121.

true ownership, he would have had the right to refuse. Thus in the case of *Becher v. The Great Eastern Railway Company*,¹⁰ the plaintiff's servant, having in charge the baggage of his master, preceded the plaintiff over the defendant's road by an earlier train on the same day. The servant delivered the plaintiff's baggage together with his own to the defendant, the defendant accepting the plaintiff's baggage as the personal baggage of the servant. The plaintiff's baggage was lost during the journey by the default of the defendant. It was held that as the plaintiff's baggage was not properly the baggage of the servant, the defendant would have had the right to refuse it if it had known to whom it belonged, and that having accepted it as the personal baggage of the servant without knowledge of its true ownership, no recovery could be had.

But if property which is not owned by the passenger is accepted by the carrier as baggage, and it is such as the passenger would be entitled to have carried as his personal baggage, it will be considered as lawfully upon the carrier's premises, and the owner may maintain an action in tort in case it is lost or injured through the carrier's misconduct. In *Meux v. The Railway Co.*,¹¹ it appeared that the plaintiff's servant, who had secured the right to be carried as a passenger over the defendant's road, delivered a portmanteau containing his livery to the defendant to be transported as baggage. The livery was the property of the plaintiff. During the transportation the livery was damaged through the negligence of the defendant's servants. It was held that since the property was such as the servant had the right to have carried as his personal baggage, it was lawfully upon the defendant's premises, and that the plaintiff could therefore sue in tort for the injury. And in *Curtis v. The Railroad*,¹² it appeared that the plaintiff took

10. L. R. 5 Q. B. 241.

11. (1895) 2 Q. B. 387, 64 L. J. Q. B. 657.

Where the baggage of a female passenger consists of her wearing apparel, and title thereto is in her

husband, he may maintain an action for its loss or injury while in the carrier's possession. *Battle v. The Railroad*, — S. Car. —, 49 S. E. Rep. 849.

12. 74 N. Y. 116.

passage on the defendant's road from Scranton, Pa., to New York, leaving his baggage, which was to some extent for the use of the members of his family, to be brought by his wife. Seven days later the plaintiff's wife followed with the plaintiff's baggage which was lost while in the defendant's possession, and through its negligence, in New York. It was held that as the plaintiff's baggage was to some extent for the use of the members of his family, it was not absolutely necessary that he should be personally present on the train with his baggage to entitle him to maintain an action for its loss. In delivering his opinion the court, Miller, J., said: "She (the wife) was certainly acting in the place and on the behalf of her husband, in traveling over the defendant's road, and it would be establishing a rigid and a severe rule, which is not sustained by authority, to hold that where the husband, by reason of business or otherwise, was obliged to leave the baggage for himself and family in charge of his wife, to be brought at a future day, that all claim for damages for any cause was lost."

If articles of merchandise are tendered by the passenger for transportation as baggage, and the carrier accepts them as such without knowledge that they are in the passenger's hands as an agent only, he will not be liable to the owner in case they are lost or injured, unless such loss or injury was occasioned by his gross negligence.¹³ But if the carrier accepts such articles for transportation with knowledge of their true character and ownership, he will be liable to the owner if they are lost or injured.¹⁴

Sec. 1277. Baggage of wife accompanied by husband—Of child accompanied by parent.—Where the husband is traveling with his wife on tickets purchased by himself, he may, on the

13. *Cattaraugus Cutlery Co. v. The Railway*, 48 N. Y. Supp. 451, 24 App. Div. 267; *Gurney v. The Railway*, 14 N. Y. Supp. 321; s. c. 138 N. Y. 638, 34 N. E. Rep. 512; *Railway Co v. Clark*, 52 Kan. 398, 34 Pac. Rep. 1054; *Railway Co. v. Liveright*, 7 Kan. App. 772, 53 Pac. Rep. 763.

14. *Talcott v. The Railroad*, 159 N. Y. 461, 54 N. E. Rep. 1; s. c. 35 N. Y. Supp. 574, 89 Hun, 492;

ground that the contract to carry himself and wife and their common baggage is made with him, maintain an action in *assumpsit* on the contract for the loss of baggage belonging to the wife.¹⁵ So where a father, who pays full fare for himself, travels with his infant child who is of such tender years that by custom no fare for its carriage is demanded, he may recover in *assumpsit* on the contract made with himself for the loss of articles brought for use by the child and which are carried as a part of his own personal baggage.¹⁶

Sec. 1278. When passenger need not accompany his baggage.—If the failure of the passenger to accompany his baggage is due to some act or omission on the part of the carrier, the latter will become responsible for it as a common carrier.¹⁷ And if the carrier agrees to forward the baggage by another train than that upon which the passenger travels, he will thereby assume with reference to it the usual liability of the carrier where the passenger and his baggage go upon the same train.¹⁸

s. c. 21 N. Y. Supp. 318, 66 Hun, 456; s. c. 80 N. Y. Supp. 149, 39 Misc. Rep. 443.

15. *Withey v. Railroad Co.*, — Mich. —, 104 N. W. Rep. 773, 1 L. R. A. (N. S.) 352, citing as analogous cases, *Moran v. Packet Co.*, 35 Me. 55; *Blanchard v. Page*, 8 Gray, 281, *Railroad Co. v. Mitchell*, 32 Fla. 77, 13 So. Rep. 673, 21 L. R. A. 487; *Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575.

16. *Withey v. Railroad Co.*, *supra*.

17. *Railroad Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. Rep. 462, citing *Wilson v. The Railway Co.*, 56 Me. 61.

See, also, *Marshall v. The Railroad*, 126 Mich. 45, 85 N. W. Rep. 242, 55 L. R. A. 650; *Wood v. The Railway*, 98 Me. 98, 56 Atl. Rep. 457, 99 Am. St. Rep. 339.

18. *Williams v. The Railroad*, 88

N. Y. Supp. 434, 93 App. Div. 582.

In *Railway Co. v. McCarty* (Tex. Civ. App.), 94 S. W. Rep. 178, plaintiff's wife was a passenger on defendant's line from Dublin to Stephenville, and at such time she placed her baggage in the custody of defendant at the former place, with the request that the same be checked to her destination. Defendant's agent informed her that the train was so near he would not have time to check the package of baggage, but would send it by express the next day. The package of baggage was not checked, but was put on the car by some one before the train left Dublin and was thereafter lost. The railway company was held liable.

In *Adger v. The Railway*, 71 S. Car. 213, 50 S. E. Rep. 783, the plaintiff applied in good faith for a ticket to the place where he de-

In *Warner v. The Railroad*,¹⁹ the plaintiff, having a ticket for a passage upon the defendant's road, was unable to procure his baggage in time to be taken upon the train upon which he wished to go, and the agent of the road agreed to forward it by the next train, whereupon the plaintiff went on without it. It was sent accordingly, but after its arrival at its destination it was broken open and its contents were taken; and it was held, in an action against the road, that the plaintiff, having paid his fare, the road, by the agreement of its agent to deliver the baggage by a subsequent train, assumed the ordinary liability of such companies where the passenger and his baggage go upon the same train; and that, whether the passenger goes upon the same train or upon a preceding or subsequent one, if the baggage goes or is sent pursuant to an agreement and as a part of the consideration moving from the company for the fare paid by the passenger, the same rule as to care and diligence would apply.²⁰

Sec. 1279. (§ 705.) Baggage when carried as freight.— But it seems that where the passenger has left his baggage be-

sired to go, and asked to have his baggage checked to such place. He informed the agent that he wished to take the train at an intermediate point where he could procure sleeping-car accommodations, his intention being to drive to such point by horse and buggy. The agent refused to sell him a ticket to destination, but sold him one to the intermediate point and checked the baggage through to destination. While in transit the baggage was lost. It was held that the plaintiff, although not a passenger on the train upon which his baggage was being carried, was nevertheless entitled to recover for its loss.

19. 22 Iowa, 166.

20. In *Shaw v. Railway*, 40

Minn. 144, the plaintiff indicated to defendant's baggage-man, as he was checking the plaintiff's baggage, that he did not care whether or not it was forwarded by the next train, which was soon to pass that station, as it would be five or six days before he would reach his destination. This was for defendant's convenience, however, rather than for plaintiff's. The baggage was not sent by the next train, but was put in defendant's baggage-room, where it was destroyed by fire the next day. *Held*, that there was evidence that the baggage was delivered for transportation and not for storage, and that the liability of a common carrier attached at the time of the delivery.

hind, without any agreement with the carrier that it is to be forwarded to him as baggage, if the carrier, after he has transported its owner as a passenger, is intrusted with his baggage to be carried to him, he will not carry it in the character of baggage, but as freight.²¹ In the absence of an agreement in such a case, it could not be said that the compensation which had been previously paid for his transportation by the passenger was also compensation for the transportation of his baggage at a subsequent and different time. The carrier would therefore be entitled to make a distinct charge for it, and he would therefore carry it as freight and not as baggage.

Sec. 1280. (§ 706.) Passenger lying over—Baggage going on.—So the passenger may, if he chooses, with the consent of the carrier, lie over upon the route and permit his baggage to proceed without him to his destination; and in such a case, it will be the duty of the carrier to keep it for him at the end of the route until he calls for it. And until a reasonable time elapses after the baggage has been placed upon the platform of the railroad station at the destination without the passenger calling for it, as we shall hereafter see, the liability of the carrier as an insurer of his safety against all accidents except the acts of God or of the public enemy will continue.²² After such reasonable time has elapsed, however, the liability of the carrier is changed to that of a warehouseman.²³ But in England,

21. *Wilson v. The Railway*, 57 Me. 138; *Graffam v. The Railroad*, 67 *id.* 234.

22. *Logan v. The Railway*, 11 Rob. (La.) 24; *Pierce's R. R. L.*, 499; *Chicago, etc., R. R. v. Fairclough*, 52 Ill. 106.

23. In *Laffrey v. Grummond*, 74 Mich. 186, defendant was the owner of a line of lake steamers running between St. Ignace and Detroit. Plaintiff took passage at St. Ignace for Detroit upon one of defendant's steamers, and checked her baggage through to Detroit.

When plaintiff purchased her ticket she informed defendant's agent that she wished to stop over for about half an hour at Alpena, one of the places at which the boat regularly stopped. She was informed that the boat remained at Alpena two hours. On reaching Alpena, however, the boat was late, and plaintiff was advised to take a stop-over check and come down on defendant's next steamer. Before landing at Alpena, plaintiff asked defendant's porter if she would better remove her baggage, and he

it would seem that if the passenger stops over upon his journey, without the consent of the carrier, and permits his baggage to be carried to his destination without him, the carrier, for the latter portion of the journey, is no longer liable as an insurer. He is, however, liable as a gratuitous bailee.²⁴

Sec. 1281. Delivery of baggage to carrier.—The passenger has the right to deliver his baggage to the carrier such time before the starting of the train upon which he intends to take passage as may be reasonably necessary for obtaining a ticket and checking the baggage. From the time delivery is thus made, the carrier will be responsible for its safety as a common carrier. If, however, an earlier delivery to the carrier be

told her that if it was put off, and she returned in time, it would have to be put on again; and if she did not return, it would be all right, and would be taken care of. Plaintiff got off at Alpena, and after finishing her business returned to the dock, but found that the steamer had gone. Plaintiff's baggage, upon its arrival at Detroit, was placed in a warehouse belonging to defendant's agents, where it was accidentally burned before plaintiff reached Detroit. It was held that defendant was not liable as an insurer, Campbell, J., saying: "The baggage was subject to delivery on call and presentation of the check; but plaintiff expected delay, and that it must be some days at least before it would be called for, and must be stored meanwhile in some way. The reasonable view seems to us to be that the warehousing at the termination of the transit was within the contemplation of both parties; and it also seems to us that it would be irrational to create a constructive relation of carriage, after

the real carriage terminated, *which should involve a larger responsibility than the actual carriage*, and to hold defendant for a loss by fire in a warehouse which is not chargeable to a warehouseman as such, *and would not have been chargeable to defendant if it had happened on board*. We can get no particular help from comparing precedents, but we think there is no rule which under our own decisions should create an exceptional liability against defendant." Query: Would not defendants have been chargeable if the baggage had been burned in transit, if the fire resulted from any other cause than plaintiff's negligence, the act of God or the public enemy?

24. *Cutler v. The Railway*, 19 Q. B. Div. 64. In this case, however, one of the judges expressly said that he did not decide that defendants were not liable as common carriers. This was immaterial, as it was sufficient in the case to hold them liable as gratuitous bailees.

made, his custody will be that of a warehouseman only, unless he has consented to hold it subject to his common law liability.²⁵ But the question as to when the carrier's liability as such with respect to baggage will begin will frequently depend upon his custom or manner of doing business at the particular station where it is received. And in order to impose upon the carrier the liability of an insurer of the baggage, it must be delivered to and accepted by an agent who is authorized to receive it, or delivery must be made under such circumstances that an acceptance by the carrier will be implied. Thus the mere leaving of a trunk at the entrance of the baggage room, without calling the attention of an agent to it, or without advising anyone in authority to whom it belongs, will not constitute a delivery to the carrier.²⁶ So the mere placing of baggage on a wheeled truck on the station platform in the absence of the station officials, there being a safe place provided in the depot and a safe road leading thereto, cannot be said to be a delivery such as will charge the carrier with liability if it is injured.²⁷

Sec. 1282. Liability of carrier for delivering baggage to wrong connecting carrier.—If the carrier, in forwarding the passenger's baggage, delivers it to a wrong connecting carrier, he will thereby become responsible for it as an insurer against any loss or injury occurring on such connecting route. Thus in *Isaacson v. The Railroad*,²⁸ the plaintiff purchased tickets at

25. *Goldberg v. The Railway*, 105 Wis. 1, 80 N. W. Rep. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221.

A rule that the baggagemaster shall not receive baggage into the baggage-room until a ticket has been purchased is unreasonable; but otherwise as to a rule that baggage shall not be checked until the passenger has procured a ticket. *Coffee v. The Railroad*, 76 Miss. 569, 25 So. Rep. 157, 71 Am. St. Rep. 535, 45 L. R. A. 112.

Whether or not a rule that bag-

gage shall not be checked until a half hour before train time is reasonable will be a question for the jury. *Goldberg v. The Railway Co.*, *supra*.

26. *Gregory v. Webb*. — Tex. Civ. App. —, 89 S. W. Rep. 1109.

27. *Lennon v. Railroad Co.*, — Iowa, —, 103 N. W. Rep. 343.

28. 94 N. Y. 278, reversing 23 Hun, 350. See, also, *Estes v. The Railroad*, 7 N. Y. Supp. 863.

New Orleans, entitling him to ride to Niagara Falls and return, over the "Mobile route." At Niagara Falls he purchased a ticket to New York city and return, over the defendant's road. While in New York, and when he was about to return to New Orleans via Niagara Falls, the plaintiff presented his tickets, with his baggage, to the baggage-master of the defendant's road, and requested him to check the baggage from New York to New Orleans over the route indicated by the tickets. The baggage-master examined the tickets and gave the plaintiff two checks, which the plaintiff put in his pocket without examining them. The plaintiff then returned to Niagara Falls over the defendant's road, and from there to New Orleans over the "Mobile route." The defendant's baggage-man did not check the trunks over the "Mobile route," but sent them from Niagara Falls over another route, known as the "Great Jackson" route, and the checks given the plaintiff contained letters and abbreviations which indicated that the baggage was to be carried over that route. The plaintiff's baggage was destroyed in an accident in Mississippi, while in the possession of one of the connecting roads, and suit was brought against the defendant, the New York Central, etc., Railroad, for the value of the trunks. It was held that the delivery of the baggage by the defendant at Niagara Falls to the "Great Jackson" route, instead of to the "Mobile," was in direct violation of plaintiff's instructions, and of the implied undertaking of the baggage-master on receiving the baggage, and it was also held that defendant's baggage-master had implied authority, "when asked by a passenger whether the company checks baggage over a route indicated by his passage tickets, to answer the questions, and to bind the company by checking it over connecting roads." And the defendant, having delivered the baggage to a different carrier than the one agreed upon, became liable as an insurer for any injury or loss occurring on the route. The question as to whether the plaintiff was guilty of contributory negligence in not examining the checks was held to be one for the jury.

Sec. 1283. Same subject—Liability of connecting carrier.—

In the case of *Fairfax v. The Railroad*,¹ the plaintiff purchased a ticket at Montreal for New York of the Grand Trunk Railway, and at the same time checked his baggage through to New York, receiving a check therefor. His ticket entitled him to ride over various connecting routes, some of which were neither owned nor controlled by the Grand Trunk Railway. From Albany to New York his ticket carried him via the People's Line of steamers down the Hudson river. When the plaintiff's baggage reached Troy it was delivered, by mistake, but without the knowledge or fault of the plaintiff, to the defendant, the New York Central, etc., Railroad, and was carried over that road to New York. The plaintiff did not call for the baggage until three days after its arrival in New York, and when he did call for it it could not be found. The defendant admitted having had the baggage up to six o'clock on the morning of the day the plaintiff called for it, but could not account for it afterwards. There was no evidence of robbery or misdelivery. The baggage had simply disappeared. The plaintiff, after two trials and appeals to the superior court, was defeated, and it was decided in that court that the carrier became responsible only as a gratuitous bailee, and could be held liable only for gross negligence. But the court of appeals, when the case appeared there for the first time, held that the defendants incurred, at least, the responsibility of a warehouseman, without discussing its liability as a common carrier, Rapallo, J., saying: "When the plaintiff demanded the article it had disappeared, and no account is given of such disappearance. This is *prima facie* evidence of negligence."²

The case was again brought to the court of appeals, this time by the defendants. It was held that the delivery of the baggage to the defendant was a wrongful act for which the plaintiff was blameless. "The defendant had no right to take and carry this baggage. It was bound to know by the marks on

1. 37 N. Y. Super. Ct. 516; 40 *id.* 128, and 43 *id.* 18 (11 J. & S.); Wimberly, 75 Ga. 316.
67 N. Y. 11, and 73 N. Y. 167.

the check that it was to be carried by another route.”³ It was sufficient for the purpose of affirming the judgment in the plaintiff’s favor to hold that the defendant incurred the responsibility of a warehouseman, and the judgment was permitted to stand for this reason. But the court, Earl, J., also said: “I am inclined to think that the defendant, in taking and conveying the baggage without the knowledge or assent of the plaintiff, might be treated as having voluntarily assumed the responsibility of a common carrier.” And again: “We do not mean to decide that the defendant incurred no greater responsibility than that of a warehouseman. It may be that it was absolutely liable for this baggage upon the theory that its interference therewith was wholly unauthorized and wrongful.”

Sec. 1284. (§ 707.) Delivery of baggage at destination.—

In practice, immediate delivery is the rule as to baggage. The carrier is always desirous to relieve himself of further responsibility by a speedy delivery, and the passenger is generally anxious to come at once into the possession of his baggage as soon as his journey is ended; and it has been said to be the duty of carriers by railways to have the baggage of their passengers ready for delivery to them immediately upon their arrival at the end of the route, or as soon thereafter as may be, and that there is a corresponding duty on the part of the passenger not to delay unreasonably its acceptance and removal, so as to relieve the carrier as soon as he conveniently can of the responsibility of its custody; and that “in such cases reasonable time and immediate delivery go hand in hand, and ‘reasonable time’ cannot extend the delivery to another day or another occasion.”⁴

Sec. 1285. (§ 708.) Passenger allowed reasonable time to call for baggage.—The rule of law, however, as to the accept-

3. The check read H. R. & R. R., meaning Hudson river and railroad. There seems to have been a dispute, however, about the meaning of these initials.

4. *Ouimit v. Henshaw*, 35 Vt. 605; *Patscheider v. The Railway*, L. R. 3 Exch. Div. 153; *Hoeger v. The Railway*, 63 Wis. 100.

ance of his baggage by the passenger, is universally stated to be, that he must be allowed a reasonable time after its arrival within which to call for and take it away, and that during this reasonable time the carrier continues responsible according to the strict rule of the law applicable to the common carrier. But the reasonable⁵ time which is allowed to the passenger for the removal of his baggage, and during which the carrier will continue responsible for it as carrier, is held not to be the same as that reasonable time which is allowed to the owner of goods or merchandise transported by railways and by carriers by water for their acceptance and removal. That which, in other words, would be a reasonable time for which the owner of freight might delay its acceptance and removal, might be unreasonable when the baggage of the passenger was in question. The passenger travels and arrives with his baggage, and can generally as conveniently accept and remove it without delay as after the lapse of a night or a day, and no matter how unseasonable the hour, he will generally find the means at hand to take it away; whereas, the goods may arrive at an hour when they could not be at once removed, or, no matter how convenient the time, the owner might not be at once prepared for their removal.

Sec. 1286. (§ 709.) What is reasonable time.—If, therefore, the passenger travels upon the same conveyance with his baggage, he must apply for it directly after its arrival at des-

5. *Patscheider v. The Railway*, L. R. 3 Exch. Div. 153; *Chicago, etc., Railroad v. Addizoat*, 17 Bradw. (Ill.) 632; *Zeigler Bros. v. Railroad Co.*, — Miss. —, 39 So. Rep. 811; *Charlotte Trouser Co. v. Railway Co.*, — N. Car. —, 51 S. E. Rep. 973; *Chesapeake, etc., Ry. Co. v. Beasley, etc., Co.*, — Va. —, 52 S. E. Rep. 566; *Rossier v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 1013.

What constitutes a reasonable time and opportunity for a pas-

senger to remove his baggage is ordinarily a mixed question of fact and law. When the facts are in dispute, the jury should decide under the instructions of the court as to the law; otherwise, it is a question of law and the court should decide it. *Railroad Co. v. McGahey*, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781. See, also, *Burgevin v. The Railroad*, 69 Hun, 479, 23 N. Y. Supp. 415.

tion; and the liability of the carrier as such for its safety will continue only such time after its arrival as will be reasonably necessary for the passenger to present his checks and take it into his custody.⁶ Hence it is held that if the passenger arrives at his destination in the night time, he cannot delay the acceptance of his baggage during the remainder of the night so as to throw upon the carrier the responsibility for its

6. *Railroad Co. v. Addizoat*, 17 Bradw. (Ill.) 632; *Goldberg v. The Railway*, 105 Wis. 1, 80 N. W. Rep. 920, 76 Am. St. Rep. 899, 47 L. R. A. 221; *Railway Co. v. Terrell*, 3 Tex Ct. Rep. 893, 72 S. W. Rep. 430; *Lewis v. The Railroad*, 13 Ky. Law Rep. 144; *Dittman v. The Railway*, 91 Iowa, 416, 59 N. W. Rep. 257, 51 Am. St. Rep. 352; *Railroad Co. v. McGahey*, 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781; *Ross v. The Railroad*, 4 Mo. App. 582.

The rigorous liability of a railroad company as a common carrier ceases when the passenger's trunk has reached its destination and has been placed upon the platform ready for delivery and a reasonable opportunity afforded to take it away. *Marshall v. The Railroad*, 126 Mich. 45, 85 N. W. Rep. 242, 55 L. R. A. 650.

A reasonable time after arrival of baggage is said, in *Chesapeake, etc., Ry. Co. v. Beasley, etc., Co.*, — Va. —, 52 S. E. Rep. 566, to depend on the character of the station and opportunities afforded by the carrier for making delivery.

Where the baggage has arrived at its destination and has been deposited in the usual or customary place of delivery and kept there a sufficient time for the passenger to

claim and remove it, the carrier's liability as such for its safety will cease. *Charlotte Trouser Co. v. Railway Co.*, — N. Car. —, 51 S. E. Rep. 973.

In *Jacobs v. Tutt*, 33 Fed. Rep. 412, where passenger arrived at 8:30 p. m., and did not call for baggage until the next morning between 9 and 10 o'clock, *held*, "that plaintiff did not demand his trunk within a reasonable time after its arrival. . . . He should have demanded it on the evening of its arrival."

In *The Railroad Co. v. Addizoat*, *supra*, a reasonable time, within which the owner must apply for his baggage, when it is transported by the same train on which he himself travels is said to be directly after its arrival and transfer to the platform, making due allowance for the confusion occasioned by the arrival and departure of the train, and for the delay necessarily caused by the crowd on the platform.

In *Nealand v. The Railroad*, 161 Mass. 67, 36 N. E. Rep. 592, a delay of 24 hours was held unreasonable. The court intimated that it would follow the same rule as to baggage which it announced as to goods in the case of *Norway Plains Co. v. The Railroad*, 1 Gray, 263, which would mean that the liabil-

safety during that time. In *Roth v. The Railroad*,⁷ it appeared that the train upon which the plaintiff, a passenger, was being carried, arrived at its destination at ten o'clock at night. As soon as it was stopped, the plaintiff got out and left the depot without inquiring for or demanding his trunk, retaining, however, his baggage check, and intending to call for it in the morning of the next day. But during the night the company's station house accidentally took fire and was burned, with a considerable amount of baggage, including the plaintiff's trunk. The next morning he went to the depot in search of his trunk, as he had proposed to do, and finding that it had been burned, he sued the company. But it was held that his delay had been unreasonable, and that his failure to call for and take away the trunk on the night of his arrival had converted the character of the custody of it by the company from that time into that of an ordinary bailee, and that it was not therefore liable. It was, however, expressly said that the rule thus laid down was not intended to apply to the case of goods or merchandise transported as freight, unaccompanied by the owner, nor to the case of the baggage of a passenger, who, with the consent of the carrier or its agents, stops at an intermediate station on the route, intending to pursue his journey

ity of a railroad company as a common carrier would cease on arrival of the baggage at the passenger's destination.

7. 34 N. Y. 548.

And see, also, the cases of *Curtis v. The Railroad*, 49 Barb. 148; *Holdridge v. The Railroad*, 56 *id.* 191; *Hurwitz v. The Packet Co.*, 56 N. Y. Supp. 379; *Torpey v. Williams*, 3 Daly, 162, and *Klein v. The Packet Company*, *id.* 390, in which the facts as to the delay of the passenger in demanding his baggage were similar, and in which it was distinctly announced that the rule applied in *Roth v.*

The Railroad, *supra*, was the settled law of the state. In the case of *Holdridge v. The Railroad*, it was held that a delay of twenty-four hours was sufficient to convert the character of the holding to that of mere warehouseman. But in *Van Horn v. Kermit*, 4 E. D. Smith, 453, this was held to be a reasonable time within which to call for baggage which had been transported with the passenger upon a vessel, and that the liability as carrier in the meantime continued. This latter case, however, was before the decision in *Roth v. The Railroad*.

on a subsequent train, and leaving his baggage in the meantime to be carried on to its destination.⁸

Sec. 1287. (§ 710.) Same subject.—This case has been considered as establishing the rule as laid down in the previous case of *Ouimit v. Henshaw*, that “reasonable time” for delivery as to baggage, however it might be as to goods or merchandise, could not extend the time for its acceptance “to another day or another occasion,” and has been followed in a number of subsequent cases in the same state and elsewhere. In *Jones v. The Transportation Company*,⁹ the plaintiff was a passenger upon a steamboat which arrived at its destination between twelve and one o’clock on Sunday morning. She remained upon the boat until eight or nine o’clock of that day, and then left it without demanding her trunk or making any arrangement for its safe keeping until her return. She returned for it on Monday, and found that it had been burned the evening before in a baggage room upon the dock, in which it had been put as unclaimed baggage. In an action by her for its value it was held that, by neglecting to present her check and receive her baggage until the next day after its arrival, she had made the defendants mere gratuitous bailees; that the fact that the day of her arrival was Sunday, on which day the statute law prohibited the doing of any secular business and all travel, furnished no excuse for her delay, and that, as the fire was not occasioned by the negligence of the defendants, they were not liable.¹⁰ So in the case of *The Louisville*,

8. In *Hoeger v. The Railway*, 63 Wis. 100, the passenger, on arriving at the station to which his trunks were checked, continued on the train to a station further along the road, without making any arrangements as to the care or retention of his baggage, and simply retained his checks. His baggage was put off at the intermediate station to which it had been checked, and, not being called for, was placed in the baggage-room,

where it was destroyed by fire the next day. *Held*, that the railway was liable as a warehouseman only.

9. 50 Barb. 193. See, also, *Graves v. The Railroad*, 51 N. Y. Supp. 636, 29 App. Div. 591.

10. A delay of one day in removing baggage is unreasonable. *Wiegand v. The Railroad*, 75 Fed. 370; s. c. 79 Fed. 991, 25 C. C. A. 681. A passenger who arrives at his destination about 8 or 9 o’clock at

etc. *Railroad Company v. Mahan*,¹¹ the plaintiff arrived at his destination in the night, and permitted his trunks to remain in the custody of the agent of the road, intending to call for them in the morning. During the night the depot-house was burned with the plaintiff's trunks. In an action against the road to recover their value, it was said that the passenger had no right to prolong the strict and rigid liability of the company as a common carrier by leaving his baggage in the possession of its agent during the night, and that unless the fire was caused by the negligence of the employees of the company he could not recover.

Sec. 1288. Same subject.—So in the case of *The Railroad Co. v. McGahey*,¹² the train upon which the plaintiff and his baggage were being carried arrived at his destination at eleven o'clock at night. The only conveyance obtainable at that hour was in a city which was located about a mile from the depot. The plaintiff, although he saw his baggage on the platform, did not demand it during the night as he intended to call for it on the following morning. The warehouse in which it was placed was destroyed by fire about one o'clock on the same night, without fault on the part of the carrier, and the baggage was lost. It was held that the plaintiff was not entitled to recover. "It appears," said the court, "that the plaintiff had a reasonable time in which he might, with the use of diligence, have received and removed his baggage before the fire occurred. There is no excuse given for his failure to do so except the lateness of the hour and the fact that there were no vehicles at the depot or 'running' that night by which it

night should remove his baggage on the same evening, or during business hours of the succeeding day. *Railroad Co. v. Patten*, 3 Kan. App. 338, 45 Pac. Rep. 103. Seven days, held to be unreasonable. *Railroad Co. v. Zilly*, 20 Ind. App. 569, 51 N. E. Rep. 141. But in *Burgevin v. The Railroad*, 69 Hun, 479, 23 N. Y. Supp. 415, it

was held that where trunks arrived between 6 and 7 o'clock in the evening, a delay in calling for them until the next morning was not an unreasonable delay.

11. 8 Bush, 184.

12. 63 Ark. 344, 38 S. W. Rep. 659, 58 Am. St. Rep. 111, 36 L. R. A. 781.

could have been removed. This merely shows that it was inconvenient for him to remove it during the night. This, in the absence of a better showing, was not sufficient to extend the reasonable time within which the plaintiff should call for it to the next morning so that, if not being called for, the defendant became liable for its custody as a carrier."

Sec. 1289. (§ 710a.) Same subject.—Where, however, a steamboat plying between St. Louis and New Orleans arrived in port at nine o'clock at night, about twelve hours later than was anticipated, and there were no hacks or conveyances at the levee, a lady passenger was permitted by the captain to remain on board during the night. At about ten o'clock the same night the boat took fire, without the fault of the carrier, and the trunk of the passenger, which had not been removed from the boat, was burned. In an action to recover the value of the trunk it was held that the captain of the boat had full authority to permit passengers to remain on board over night when the boat was late and arrived at night. It was also held that passengers so remaining continued as passengers, and the voyage as to them did not end until they had had a reasonable time to leave the vessel the next morning, and that this applied as well to the baggage of the passengers as the passengers themselves.¹³

Sec. 1290. (§ 711.) Same subject—Dissent from prevailing construction of "reasonable time."—But the rule of exemption from strict liability as to baggage thus established was said, by Church, C. J., in *Burnell v. The Railroad*,¹⁴ to have carried the law upon the subject "to the utmost limit of propriety, to say the least of it," and would seem from this language to be emphatically disapproved by him. Its effect is certainly to require of the passenger an immediate acceptance of his baggage, instead of allowing the "reasonable time" to which, according to the terms of the rule as stated, he would seem to be entitled; and if it is to be interpreted in this manner, it would certainly be a more appropriate use of language

¹³. *Prickett v. New Orleans Anchor Line*, 13 Mo. App. 436. ¹⁴. 45 N. Y. 184.

to state the rule as requiring an immediate call for and acceptance of his baggage by the passenger, than to say that he must do so within a reasonable time.

Sec. 1291. (§ 712.) Strict liability of carrier succeeded by that of warehouseman.—But it by no means follows that when the relation of carrier to the baggage ceases, by the delay of the owner to call for and accept it within a reasonable time, the carrier's duty in reference to it ceases, or that his liability is at an end. The change effected by such delay is merely the substitution of a custody in one character for that in another, or, rather, the continuation of the responsibility in a different character and in a different degree. When the relation of carrier ceases, that of warehouseman takes its place, and, as such, the carrier is bound, under his contract for the carriage, to take reasonable care of the baggage, and if it be lost by his negligence, he will be liable to the owner.¹⁵

15. *Mote v. The Railroad*, 27 Iowa, 22; *Chicago, etc., R. R. v. Fairclough*, 52 Ill. 106; *Bartholomew v. The Railroad*, 53 *id.* 227; *Powell v. Myers*, 26 Wend. 591; *Burnell v. The Railroad*, 45 N. Y. 184; *Mattison v. The Railroad*, 57 *id.* 552; *s. c.* 76 *id.* 381; *Whitney v. The Railway*, 27 Wis. 327; *Fairfax v. The Railroad*, 67 N. Y. 11; *Rome Railroad v. Wimberly*, 75 Ga. 316; *Marshall v. The Railroad*, 126 Mich. 45, 85 N. W. Rep. 242, 55 L. R. A. 650; *Blackmore v. The Railway*, 162 Mo. 455, 62 S. W. Rep. 993; *Cohen v. The Railway*, 59 Mo. App. 66; *Seasongood v. The Railroad*, 14 Ky. Law Rep. 430; *Railway Co. v. Newhoff*, 12 Ky. Law Rep. 467; *Kahn v. The Railroad*, 115 N. Car. 638, 20 S. E. Rep. 169; *Railroad Co. v. Zilly*, 20 Ind. App. 569, 51 N. E. Rep. 141; *Railroad v. Patten*, 3 Kan. App. 338, 45 Pac. Rep. 108; *Mortland v. The*

Railroad, 81 Hun, 473, 30 N. Y. Supp. 1021; *Aaronson v. The Railroad*, 52 N. Y. Supp. 95, 23 Misc. 666; *Railway Co. v. Smith* (Tex. Civ. App.), 24 S. W. Rep. 668; *Railway Co. v. Terrell*, 6 Tex. Ct. Rep. 893, 72 S. W. Rep. 430; *Wiegand v. The Railroad*, 75 Fed. 370; *s. c.* 79 Fed. 991, 25 C. C. A. 681; *Lewis v. The Railroad*, 13 Ky. Law Rep. 144; *Charlotte Trouser Co. v. Railway Co.*, — N. Car. —, 51 S. E. Rep. 973.

The duty of a warehouseman requires that the baggage be placed in a proper and suitable baggage-room, and the exercise of ordinary care and diligence in safely keeping it there. *Hoeger v. The Railway*, 63 Wis. 100. And in St. Louis, etc., *Railway v. Hardway*, 17 Bradw. (Ill.) 321, a ladies' waiting-room in a station, although locked and with the windows closed and fastened, was held not

Sec. 1292. (§ 713.) Liability for negligence of subsidiary carrier.—And this duty or obligation, with its modified liability of storing and exercising ordinary care to preserve and protect the passenger's baggage, upon the happening of the contingent event of its not being called for, is incurred at the time when the contract for the carriage is entered into, and is a part of the contract itself. Hence, if the carrier has contracted for the carriage of the passenger to destination, which makes the employment of other carriers necessary, and the baggage of the passenger is lost while in the custody of the subsidiary carrier, but after it has ceased to occupy the relation of carrier to it, and has become merely its warehouseman, by reason of the delay of the passenger in calling for it, the carrier which made the contract for the carriage will be liable to the passenger for the loss, when it has occurred through the negligence of the subsidiary carrier which has completed the transportation.¹⁶ The fair construction of such a contract is said to be, that the carrier agrees for a consideration to transport the passenger and his baggage to his destination, and deliver the latter to him on its arrival, if called for, and if not called for, that it shall be properly stored and reasonable care shall be exercised to prevent injury or loss, until it is called for or is lawfully disposed of.

Sec. 1293. (§ 714.) Strict liability of carrier preserved where delay is caused by carrier.—If, however, it is not the

to be a proper or suitable store-room in which to leave uncalled-for baggage, unguarded. And see *Georgia, etc., Company v. Thompson*, 12 S. E. Rep. (Ga.) 640, where it is held that if, after the carrier has delivered her trunk to a passenger, she immediately redelivers it to the carrier's station agent, to keep for her, the carrier is no longer liable in any capacity; and the station agent becomes the agent of the passenger, who must look to him for any damages she

may sustain. See, also, *Hodkinson v. The Railway*, 14 Q. B. Div. 228.

It is a question for the jury whether a baggage-room is kept by the carrier in a reasonably safe condition for the storage of baggage. *Nealand v. The Railroad*, 161 Mass. 67, 36 N. E. Rep. 592.

16. *Burnell v. The Railroad*, 45 N. Y. 184; *Mattison v. The Railroad*, 57 N. Y. 552; s. c. 76 N. Y. 381; *Carey v. The Railroad*, 29 Barb. 35.

usual custom for the carrier to deliver baggage immediately after its arrival at destination, or if he has caused or contributed to a delay in its delivery, he cannot claim the benefit of the rule which diminishes his liability as a common carrier to that of warehouseman, or ordinary bailee, by reason of the negligence or delay of the passenger in accepting his baggage. Where the plaintiff arrived at her destination in the afternoon, and waited for her baggage, but could find no one to deliver it to her, and sent for it on the night of the same day, when the baggage-master was again absent, and, when he was found, no conveyance could be procured to take the baggage away, owing to the lateness of the hour, it was held that the delay in the delivery had been caused by the fault of the company, and that its liability as carrier had not ended when, during the night, the depot was entered by burglars, and the trunk was broken open and rifled of its contents.¹⁷

17. *Dininny v. The Railroad*, 49 N. Y. 546; *Kansas City, etc., Railroad v. Morrison*, 34 Kan. 502; *Dittman v. The Railway*, 91 Iowa, 416, 59 N. W. Rep. 257, 51 Am. St. Rep. 352; *Felton v. The Railway*, 86 Mo. App. 332; *The New England*, 110 Fed. 415.

Where a passenger calls for her baggage on the evening of its arrival, and the carrier refuses to deliver it until the following morning, and it is destroyed by fire during the night, the carrier will be liable as such for its loss. *Georgia, etc. R. Co. v. Phillips*, 93 Ga. 801, 20 S. E. Rep. 646.

In *Jacobs v. Tutt*, 33 Fed. Rep. 412, at the hour when trains arrived, there was an accumulation of baggage, causing, frequently, a delay of two hours in delivery. *Held*, that a passenger might lawfully postpone claiming his baggage until such an hour as the company was ordinarily prepared

to deliver baggage (say for a space of time not exceeding two hours). In this case the passenger did not call for his baggage within a reasonable time. But it having been proved that his trunk was stolen within two hours after its arrival, and in view of the customary delay of the company in delivering baggage, the company was held liable as insurers. But in *Chicago, etc., Railroad v. Addisoat*, 17 Bradw. (Ill.) 632, where baggage did not arrive on same train with passenger, through fault of carrier; and where passenger called for his baggage on his arrival and found it had not arrived, yet he gave no directions to the baggage-master concerning its disposition when it should arrive, and no information to identify himself, and made no further inquiry, and the depot burned the next night, it was held that it was the passenger's duty to make inquiry for the

Sec. 1294. Delivery by carrier to transfer company—Delivery by transfer company.—If the carrier by railroad permits the agents of a transfer company to board its train for the purpose of soliciting, before reaching the passenger's destination, the transfer of his baggage, and the passenger engages the transfer company for that purpose, the question arises as to when the liability of the railroad company as a carrier of the baggage will terminate, and that of the transfer company begin. If no demand is made by the transfer company for the baggage until the train has reached the passenger's destination, the liability of the railroad company as a common carrier will continue until the train has reached that point, and for such time thereafter as will be reasonably necessary for the transfer company to present the check and demand the baggage.¹ If, however, the transfer company surrenders the check to the railroad company and marks the baggage for identification before the train has reached the passenger's destination, it will thereby make the railroad company its bailee, and it will be liable if the baggage is subsequently lost or injured.²

And where a local carrier, as a carter or transfer company,

baggage within a reasonable time after the arrival of the next train. His failure to do so justified the conclusion that trunks were left for his own accommodation, or that he was guilty of such a degree of negligence as to preclude him from recovery, in the absence of such negligence on the part of the company as would render it liable as a warehouseman. In *Coward v. The Railroad*, 16 Lea (Tenn.), 225, the passenger's trunk did not arrive until several hours after the passenger had reached his destination. When the trunk did arrive, it had been broken open and rifled. *Held*, that the fact that the trunk arrived on a

later train was evidence of the carrier's negligence. The failure to transport the trunk on the same train with the passenger was said to be "not only a violation of the contract which the law implies," . . . "but is also gross negligence."

1. *Aikin v. Westcott*, 123 N. Y. 363, 25 N. E. Rep. 503, reversing s. c. 9 N. Y. Supp. 481, 14 Daly, 504

2. *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. Rep. 693; s. c. 46 N. Y. Supp. 589, 19 App. Div. 366; s. c. 37 N. Y. Supp. 909, 2 App. Div. 295; s. c. 33 N. Y. Supp. 805, 87 Hun, 190; s. c. 29 N. Y. Supp. 149, 78 Hun, 369.

undertakes to transport baggage from one place to another within a city, his responsibility as a carrier of the baggage will cease when he has fulfilled the contract for its transportation by delivering it at its destination; and if, in consequence of the owner not being at the appointed place to receive it, it is subsequently lost, such owner will be without recourse against the carrier.³

Sec. 1295. (§ 714a.) Passenger's right to have baggage delivered at any regular station at which train stops.—The passenger, it is held, has the right to demand and receive his baggage at any regular station or stopping place for the train upon which he is traveling. Thus in the case of Pittsburgh, etc. Railway Co. *v.* Lyon,⁴ a passenger attempted to purchase a ticket from Washington, Pa., to Birmingham, the latter being one of five regular stations within the city of Pittsburgh. He was informed that no tickets were sold to Birmingham, but that a ticket to Pittsburgh covered all stations within the city limits. The passenger purchased a ticket to Pittsburgh, and presenting it to the baggage-agent, asked to have his trunk checked to Birmingham. This the baggage-agent refused to do, saying that the rules of the company required all baggage to be checked to the point of destination shown upon the ticket. The passenger at first refused to accept the check tendered, but finally accepted it and his trunk was placed on the train. The train stopped at Birmingham and the passenger alighted and demanded his trunk, which was refused, and carried one mile further to the union depot in Pittsburgh. The passenger afterwards brought suit against the company for damages, and although only nominal damage was shown, he was permitted to recover exemplary damages. And in affirming the judgment, Sterrett, J., said: . . . "The traveling public have some rights, one of which is the transportation of themselves and baggage over any of the railroads of the commonwealth, and that includes the right to stop and re-

3. *Benoliel v. Durocher* (Canada), *Rap. Jud. Que.* 13 C. S. 260.

4. 123 Penn. St. 140.

ceive their baggage at any regular station or stopping place for the train on which they may be traveling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable and illegal."

But a mere privilege, extrinsic of a contract for through carriage, whereby the passenger is permitted to stop off overnight at an intermediate station and resume his journey on the next day, will not give him the right to require the railroad company to unload and reload his baggage at such station.⁵

Sec. 1296. (§ 715.) Connecting carriers—Through contract.—The carriage of baggage being a mere incident to the carriage of the passenger, a through contract as to the passenger will be a through contract as to his baggage.⁶ And what constitutes a through contract for the passenger, or, in other words, a contract for the entire transportation to his destination, though it may require his carriage in part by other carriers or by other lines of carriers, is in most respects the same as that which is required to constitute a contract for the through transportation of goods, and has already been discussed.⁷ But, as in the case of goods, although the first carrier may contract and be responsible for the entire transportation, any subsequent and auxiliary carrier to whose fault it can be traced will be liable to the owner for the loss of his baggage.⁸

Sec. 1297. Contracts limiting liability.—In general, it may be stated that there is no distinction between the baggage of a passenger and ordinary goods, in respect to the rights of the parties to enter into contracts limiting the liability of the carrier; and all that has heretofore been said upon the subject of the limitation of the liability of the common carrier, by con-

5. *Howell v. The Railway*, 92 Hun, 423, 36 N. Y. Supp. 544.

6. *Wilson v. The Railroad*, 21 Gratt. 654; *Hart v. The Railroad*, 8 N. Y. 37; *Weed v. The Railroad*, 19 Wend. 534; Ill. Cent. R. R. v.

Copeland, 24 Ill. 332; *Candee v. The Railroad*, 21 Wis. 582; *Mytton v. The Railway*, 4 Hurl. & N. 615.

7. *Ante*, ch. VII.

8. Ill. Cent. R. R. v. *Franken-*

tract with his employer,⁹ will be equally applicable, whether the subject of the carriage be ordinary freight or the passenger's baggage.¹⁰

Sec. 1298. Same subject—Terms of limitation on baggage checks.—A distinction, however, in respect to terms or conditions intended to limit the carrier's liability, exists between the ordinary receipt delivered by the carrier for shipments of merchandise and baggage checks which are issued to passengers for their baggage. The custom of including in a receipt for merchandise the terms of a special contract has become so well established that it may fairly be said that no shipper can justly plead ignorance of such custom. Where, therefore, the shipper accepts a receipt for his merchandise, he is conclusively presumed, in the absence of proof of any unfair means having been resorted to by the carrier to keep him from understanding its terms, to have assented to its lawful limitations.¹¹ But the ordinary baggage check is a mere token given by the carrier as evidence that he has received the passenger's baggage, and does not of itself import a contract.¹² Hence, any limitations which are written or printed upon a baggage check will be considered as notices only, and no presumption will arise that they were known to the passenger and assented to by him when the check was delivered to him; and unless it can be shown that they were called to his attention, or that the circumstances were such that he must have known of them when he accepted the check, they will not avail the carrier.¹³

berg, 54 Ill. 88; Toledo, etc. R'y v. Merriman, 52 Ill. 123; Cincinnati etc. R. R. v. Pontius, 19 Ohio St. 221; Coats v. The Express Co., 45 Mo. 238; Barter v. Wheeler, 49 N. H. 9.

9. *Ante*, ch. V.

10. *Steers v. The Steamship Co.*, 57 N. Y. 1.

11. *Ante*, §§ 408, 409.

12. *Isaacson v. The Railroad*, 94 N. Y. 278; *Griffith v. Railway Co.*,

— Mo. App. —, 90 S. W. Rep. 408.

13. *Parker v. South Eastern Railway Co.*, 2 C. P. D. 416. See also, *Bernstein v. Weir*, 83 N. Y. Supp. 48, 40 Misc. 635; *Grossman v. Dodd*, 63 Hun, 324, 17 N. Y. Supp. 855; *Pompily v. Manhattan Delivery Co.*, 84 N. Y. Supp. 230; *Strong v. The Railroad*, 86 N. Y. Supp. 911, 91 App. Div. 442; *Engberman v. Steamship Co.*, 84 N. Y.

A baggage check may, however, be tendered by the carrier as a special contract, and when it is so accepted by the passenger, he will be held to have assented to such of its lawful limitations as were properly embodied in the contract.

Sec. 1299. Same subject—Terms of limitation on passenger tickets.—Conditions intended to restrict the carrier's common law liability in respect to the carriage of baggage are frequently written or printed upon passenger tickets, and the question arises as to the extent to which such conditions will be binding on the person accepting the ticket. If the ticket imports a special contract, the presumption will arise that the person accepting the ticket knew of and thereby assented to such of its lawful limitations as were plainly written or printed upon it as a part of the contract.¹⁴ But no presumption will

Supp. 201; *Walker v. Platt*, 69 N. Y. Supp. 943, 34 Misc. 799; *Malone v. Express Co.*, 86 N. Y. Supp. 911, 239; *Springer v. Westcott*, 166 N. Y. 117, 59 N. E. Rep. 693; *Transportation Co. v. Theilbar*, 86 Ill. 71; *Wilson v. The Railroad*, 21 Grattan, 654.

14. *Jacobs v. The Railroad*, 208 Penn. St. 535, 57 Atl. Rep. 982. But although the ticket imports a special contract, if the passenger's eyesight is bad and she is misled by the answers she receives from the carrier's agent as to the effect of its conditions, they will not be binding on her. *Katherine Bate v. Railway Co.*, Canada Sup. Ct. Cas. (Cameron) 10, reversing 15 Ont. App. R. 388.

A limitation that the carrier will not be liable for more than 150 pounds of baggage at \$1.00 per pound is not unreasonable. *Jacobs v. the Railroad*, *supra*. But where the carrier demands and receives extra charges for carrying the passenger's baggage, the passenger is

not limited in his recovery for its loss by the provisions of his ticket. *Glovinsky v. Steamship Co.*, 26 N. Y. Supp. 751, 6 Misc. 388; *Wasserberg v. Steamship Co.*, 28 N. Y. Supp. 520, 8 Misc. Rep. 78.

A provision in a free pass that the carrier will not be liable for the loss of or any damage to the baggage of the person using the pass, *held*, not to be unreasonable. *Holly v. The Railroad*, 119 Ga. 767, 47 S. E. Rep. 188.

The carrier may fix a reasonable limit to the passenger's baggage beyond which it will not be liable as an insurer. "A reasonable limit must be that limit which a passenger may reasonably be expected to observe—the limit of the value of the baggage ordinarily carried by a passenger under the circumstances supposed. If the value thus disclosed exceeds that which the passenger may reasonably demand to be transported as baggage without extra compensation, the carrier, at its option, can make such addition

arise that the person accepting the ticket had knowledge of any written or printed limitations which were not properly a part of the contract embodied in the ticket. Unless, therefore, it can be shown that they were called to his attention, or that the circumstances were such that he must have known of them when he accepted the ticket, they will be of no effect in relieving the carrier. So if the ticket does not of itself import a special contract, no presumption will arise that the person accepting the ticket had knowledge of any limitations which were written or printed upon it; and unless it is made to appear that his assent to them was fairly obtained, they will not avail the carrier.¹⁵ And although the ticket may import a

al charge as the risk fairly justifies. To the extent, therefore, that the articles carried by the passenger for his personal use exceed in quantity and value such as are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by general law, is responsible as insurer." *The New England*, 110 Fed. 415.

But a stipulation in the ticket limiting the liability of the carrier to a stated sum in case the baggage is lost does not apply to extra baggage upon which excess charges have been paid. So where the sum stated is out of all harmony to the sum paid for its carriage, and the quantity of the baggage itself, the limitation will be considered unreasonable and cannot be enforced. *La Bourgoyne*, 144 Fed. 781.

15. *The Majestic*, 166 U. S. 375, 17 Sup. Ct. R. 597, 41 L. Ed. 1039; *The New England*, 110 Fed. 415; *The Minnetonka*, 132 Fed. 52; *Richardson, Spence & Co. v. Rowntree*, L. R. (1894) App. Cas. 217,

63 L. J. Q. B. 283; *Parker v. The Railway*, 2 C. P. D. 416; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Railroad Co. v. Campbell*, 36 Ohio St. 647; *Ranchau v. The Railroad*, 71 Vt. 142, 43 Atl. Rep. 11, 76 Am. St. Rep. 761; *Railroad Co. v. Weigand*, 79 Fed. 991, 39 U. S. App. 761, 25 C. C. A. 681; *Smith v. Steamship Co.*, 142 Fed. 1032; *La Bourgoyne*, — C. C. A. —, 144 Fed. 781.

In *Camden, etc. R. R. v. Baldauf*, 16 Penn. St. 67, a notice was printed in the English language and the ticket was given to a German passenger who could not understand that language. It was held to be incumbent on the carrier to prove that the passenger had knowledge of the limitation stated in the notice; that if such tickets are in any case to be considered as evidence of a special contract, they must be printed in a language which the passenger understands or their terms must be explained to him.

In *Kansas City, etc. R. Co. v. Rodebaugh*, 38 Kan. 45, it is said: "Where a person purchases a

special contract, yet if the conditions intended to limit the carrier's liability be written or printed upon the back of the ticket, no presumption will arise that they were known to the passenger, and they will be no evidence in the carrier's favor

ticket, he does not expect that thereby he is making a contract limiting the liability of the railroad company, but simply that he is receiving a check showing that the fare has been paid over the line to the place of destination." And in the case of *Mauritz v. The Railroad*, 23 Fed. 765, Dyer, J., in delivering the opinion of the court, said: "In the one case the shipper is supposed to understand and know that according to commercial usage a bill of lading is essential to the regular and safe transportation of property which is shipped and carried as freight, and that of necessity it must constitute the contract of shipment and carriage. In the other case the ticket is ordinarily regarded as a mere voucher for the money paid for it, a token or evidence of the purchaser's right to be carried, or to have his baggage carried a certain distance. And when from the undisputed circumstances of the transaction it is apparent that the passenger rightfully took the ticket as a mere receipt or voucher evidencing his right to be carried, and enabling him to follow and identify his property, and without notice that it embodied the terms of a special contract or was intended to subserve any other purpose than that of a voucher, it would seem that his omission to read the paper ought not to be held negligence, and that as matter of law he

should not be held bound by limitations of which he had no knowledge, and to which, therefore, he did not assent." In this case the passenger was a German and could not read the limitation printed in English on his ticket. In a note to the above case a summary of the decisions is given in brief, and the following conclusions are drawn from them: "In making a contract with a passenger for his transportation, a railway company may limit its liability, but, as a general rule, not for its negligence. Mere notice that the railway company will not be liable in certain named contingencies will not suffice to create a contract of limitation; there must be a clear, unequivocal assent on the part of the passenger. Such assent may be express or implied; but it will not be implied—(1) where the notice is obscurely printed, or printed in a language which the passenger cannot understand; (2) where the nature of the transaction is not such as necessarily to charge the passenger or shipper with knowledge that the paper contains a contract; *e. g.*, the acceptance of a bill of lading would be a transaction carrying notice of a contract printed upon it, but the acceptance of a ticket with conditions printed on it would not be such a transaction; nor (3) would a contract be created where the circumstances attending the delivery of the ticket repel the

unless it can be shown that they were assented to by the passenger when he accepted the ticket.¹⁶

Sec. 1300. (§ 716.) Liability for baggage when passenger is carried gratuitously.—The compensation paid by the passenger for his transportation being also the compensation which the carrier receives for the carriage of his baggage, if the passenger is carried gratuitously, the carrier receives no reward for the carriage of his baggage, unless it be otherwise agreed; nor could he recover compensation for the service, because no compensation could be claimed for a service which is performed as the mere incident of a gratuity. And although the law, out of regard to human life and safety, may hold the carrier, in such a case, to the obligation of using the same care and diligence as in the carriage of the passenger for which he receives compensation, it will not fix upon him the responsibility of a common carrier unless he is paid or has the right to claim his reward. He is, therefore, as to the baggage of such a passenger, only a gratuitous bailee, and can be held liable for its loss only when it has been caused by his negligence;¹⁷ and it will devolve upon the passenger to prove that he has been negligent to that degree which is necessary to impose liability upon the bailee without reward and for the sole benefit of the bailor.¹⁸

idea that the acceptor had knowledge of, or in fact assented to, the contract printed thereupon."

16. See *Brown v. The Railroad*, 11 Cush. 97; *Malone v. The Railroad*, 12 Gray, 388; *Limburger v. Westcott*, 49 Barb. 283; *McMillan v. The Railroad*, 16 Mich. 79; *Brittan v. Barnaby*, 21 How. 527; *Verner v. Sweitzer*, 32 Penn. St. 208; *Rawson v. The Railroad*, 48 N. Y. 212.

17. *Flint, etc. R'y v. Weir*, 37 Mich. 111, 5 Cent. Law Jour. 285; *White v. The Railway*, — Tex. Civ. App. — 86 S. W. Rep.

962; *Holly v. The Railway*, 119 Ga. 767, 47 S. E. Rep. 188.

Where the carrier holds baggage in his possession as a gratuitous bailee, and the same is deposited in a well constructed baggage-room with doors and windows closed in the ordinary manner, he is not liable for its loss where it is stolen by a thief who feloniously enters the baggage-room by breaking a pane of glass in one of the windows. *Wood v. The Railroad*, 98 Me. 98, 56 Atl. Rep. 457, 99 Am. St. Rep. 339.

18. *Ante*, § 16 *et seq.*

Sec. 1301. (§ 717.) Baggage checks.—The introduction of railroads and steamboats as the means for the transportation of passengers and their baggage, and the establishment of long, connecting lines to facilitate travel, have led to the almost universal practice of giving to the passenger what are denominated “checks” for his baggage. Such checks are intended to relieve the passenger from the necessity and trouble of attention to his baggage during his journey, although it may be over any number of lines of carriers, and to put the obligation of such care upon the carriers themselves. They constitute *prima facie* evidence that the carrier has received his baggage from the holder, and that it has never been redelivered to him.¹⁹ It is, however, only *prima facie* evidence of the fact,

In *Rice v. Railroad*, 22 Ill. App. 643, plaintiff was riding over defendant’s road upon a pass, and, on account of a broken bridge, the baggage-car, containing plaintiff’s baggage, was precipitated into the water and plaintiff’s baggage damaged. While it was held by the court that defendant was liable as a gratuitous bailee only, yet it was said: “From these facts negligence would be presumed, and whether the degree of negligence was such as would render defendant liable for the damages to the baggage was a question for the jury to determine.”

19. *Davis v. The Railroad*, 22 Ill. 278; *Railway Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. Rep. 523; *Railroad Co. v. Steear*, 53 Neb. 95, 73 N. W. Rep. 466.

Where the baggage check is produced, a *prima facie* case of delivery to the carrier is made out. *Graham & Morton v. Young*, 117 Ill. App. 257.

In *Matteson v. The Railroad*, 76

N. Y. 381, where checks were surrendered to the baggage-master, and the baggage was to be left at the depot for two weeks, this was held not to be conclusive evidence of the delivery of the baggage to the passenger. In *Lake Shore, etc. Railway v. Foster*, 104 Ind. 293, the court say: “There is no reason why railway companies may not receive baggage in advance of the train upon which it is to be transported, and in advance of the purchase of a ticket or the payment of fare by the owner, and thus become liable for its loss. They undoubtedly have the right to make reasonable rules and regulations, and a rule that a person intending to become a passenger shall purchase a ticket or pay fare before the company receives and becomes responsible for his baggage, is, undoubtedly, a reasonable regulation, as such a regulation secures good faith and fair dealing. But if the company adopts no such rule, or if, having adopted, it adopts a practice

and the carrier may show that the baggage was never delivered to him, as the holding of the check would imply, or that it has been given to the owner.²⁰ Such checks do not, however, identify the baggage further than by numbers upon the checks, and in case of loss, it will be necessary, by other proof, to show its description and value. And although the carrier is entitled to demand that the check be presented when the baggage is called for, if for any reason the person demanding the baggage is unable to do so, the carrier cannot, on that account alone, unreasonably refuse to deliver the baggage to him. In such a case the carrier may insist on a reasonable identification of the person demanding the baggage and on proof of ownership, but after such proof has been furnished, he cannot rightfully refuse to make delivery.²¹

Sec. 1302. (§ 718.) What a baggage check implies.—Baggage checks, however, are mere tokens to evidence the receipt of the baggage by the carrier. They do not of themselves import a contract.²² The contract to carry the passenger himself is the contract to carry his baggage. His passenger's ticket is therefore the evidence that the carrier has also contracted to carry his baggage. The check, however, may be looked at in connection with the ticket or contract for the carriage of the passenger, as one of the means for determining whether

and custom to the contrary, or if, notwithstanding such a rule, it receives a person's trunk as baggage, trusting to his honesty to purchase a ticket or passage upon the train upon which the trunk is to go, it will be liable for its loss whether that loss occurs before or after the arrival and departure of the train, or before or after the purchase of a ticket or payment of fare." In this case no check was given. In *Waldron v. The Railroad*, 1 Dak. Ter. 336, a baggage-man assumed to carry a box without a check

for the reason that there was no place to attach one, and the company was held liable for the loss of the box.

20. *The Chicago, etc. R. R. Co. v. Clayton*, 78 Ill. 616.

21. *Railway Co. v. Tyler*, 9 Ind. App. 689, 35 N. E. Rep. 523.

22. *Isaacson v. The Railroad*, 94 N. Y. 278; *Hyman v. The Railroad*, 66 Hun, 202, 21 N. Y. Supp. 119; *Marmorstein v. The Railroad*, 34 N. Y. Supp. 97, 13 Misc. 32; *Griffith v. Railway Co.*, — Mo. App. —, 90 S. W. Rep. 408.

the contract was for the entire transportation of the passenger to his destination, or was only for transportation over its own line. This was done in the case of *Wilson v. The Railroad*, *supra*, in which, the question being whether the contract for the carriage of the passenger by the railroad company was for the entire distance to the White Sulphur Springs, the baggage checks given the passenger, with the letters W. S. S. stamped upon them, were considered important as showing the intent of the company.²³ But a through check of itself, without a contract for the through transportation of the owner, will not make the carrier responsible for a loss of the baggage by other carriers, into whose possession it may come to complete or to further the transportation, in the absence of a partnership or some joint interest between the carriers which will make them liable for each other's defaults.²⁴

Sec. 1303. (§ 719.) The carrier's lien upon baggage.—The carrier of the passenger has the same lien upon his baggage, to secure the payment of the price of the carriage, which the common carrier has upon the goods which he has carried for his freight, the nature and extent of which has been heretofore explained.²⁵ But he has no lien upon the clothes or wearing

23. And see to the same effect, *The Railroad v. Copeland*, 24 Ill. 332; *Dill v. The Railroad*, 7 Rich. (Law), 158; *Milnor v. The Railroad*, 53 N. Y. 363.

24. *Green v. The Railroad*, 4 Daly, 553; *Stimson v. The Railroad*, 98 Mass. 83; *Marmorstein v. The Railroad*, *supra*.

25. *Wolf v. Summers*, 2 Camp. 631; *Story on Bail*, sec. 604.

In *Roberts v. Koehler*, 30 Fed. Rep. 94, plaintiff purchased an unconditional ticket for a passage from Portland to Ashland, and after his ticket had been taken up by the conductor, he stopped over at Grant's Pass, without defendant's consent, leav-

ing his baggage to be carried on to Ashland. On the next day plaintiff got on defendant's train at Grant's Pass and was requested by the conductor to pay additional fare to Ashland, but refused, and defendant refused to deliver plaintiff's baggage to him until additional fare was paid. *Held*, that the journey from Portland to Ashland was performed under one contract, modified by the action of plaintiff in stopping over, whereby he incurred an additional charge for his transportation, for which the carrier had a lien on the baggage so long as it remained in his possession.

apparel which the passenger has upon his person, nor upon anything which he retains in his exclusive possession for his personal use; and neither the carrier nor his employe has the right to take forcibly from the possession of the passenger anything which he so retains; and if he do so, he will be liable to an action for an assault and battery by the passenger.²⁶ Nor has he the right to detain the passenger himself, to compel the payment of his fare, though it was formerly thought otherwise, as we have seen, as to innkeepers. But where passengers were required, by a regulation of the carrier, to deliver up their tickets upon leaving the boat at the termination of its trip, and a passenger claimed, when in the act of leaving, that he had lost his ticket, it was held by the supreme court of Massachusetts that the officer of the boat had the right to detain the passenger, at least until the circumstances could be investigated, if not to compel the payment of the fare.²⁷

26. *Ramsden v. The Railroad*, 104 Mass. 117.

27. *Standish v. Steamship Co.*, 111 Mass. 512.

Where a woman in good faith becomes a passenger pursuant to a ticket obtained in due and regular course upon a prepaid certificate procured for her by her husband from the carrier, the fact that the carrier has refunded the

money received for the prepaid certificate to the husband, without notice to or knowledge on the part of the woman, and without requiring the husband to give up the certificate, will not be sufficient to deprive her of her baggage or give the carrier a lien upon it for unpaid passage money. *Moszkowitz v. Navigation Co.*, 84 N. Y. Supp. 297.

CHAPTER XIV.

OF ACTIONS AGAINST COMMON CARRIERS.

I. THE PARTIES.

- § 1304. Who may sue the carrier for loss of or damage to the goods.
1305. One having special property may sue.
1306. Owner may sue.
1307. Person making contract with the carrier may sue.
1308. Same subject—Even if plaintiff have no interest in goods.
1309. Same subject—States following this doctrine.
1310. Same subject—Doctrine supported by English cases.
1311. Same subject—Advantage of this rule.
1312. Conclusions from previous cases.
1313. Contract need not be in writing to enable shipper to sue.
1314. The rule of these cases stated—Only owner may sue in tort.
1315. Rule that only owner can sue.
1316. Rule that mere agent without interest cannot sue.
1317. When consignee may sue.
1318. When consignor the proper party.
1319. Same subject—Where sale is void, or where contract of sale is rescinded, consignor should sue.

§ 1320. Conclusions on this subject.

II. THE FORM OF ACTION.

1321. The form of action.
1322. Original theory as to carrier's obligation.
1323. First recognition of the theory of the carrier's contract obligation.
1324. Action on the case.
1325. Action in case is several and not joint.
1326. Advantage of declaring in case.
1327. Action in assumpsit.
1328. How character of action determined.
1329. Same subject.
1330. Distinction in form of action now generally unimportant.
1331. When action should be upon the contract.
1332. When action should be for breach of duty.

III. THE PLEADINGS.

1333. Important to determine if plaintiff's declaration be in case or assumpsit.
1334. What the declaration must allege.
1335. When action is on the contract it must be set out correctly.

1336. Same subject—Example of particularity requisite in declaring on contract.
1337. Same subject — Variance between declaration and proof fatal.
1338. Same subject—Whole contract must be stated.
1339. Reasons for requiring particularity in declaring.
1340. Mere collateral stipulations need not be stated.
1341. Pleadings in action for statutory penalty for excessive charge.
1342. How common-law action for excessive charge is affected by statutory action.
1343. What is sufficient averment of an over-charge at common law.
1344. Statements as to the carrier's reward or compensation.
1345. The carrier's defense to the action.
- IV. THE EVIDENCE.
1346. What must be proved by the plaintiff.
1347. Plaintiff must show whose negligence caused loss.
1348. Presumption that each of several connecting carriers received goods in same condition as when delivered to first carrier—Burden of proof to show contrary.
1349. Same subject — Rule in Michigan.
1350. Contract with carrier may be either express or implied.
1351. Express contract not necessary—Delivery and acceptance enough.
- § 1352. Plaintiff must produce some evidence of loss—What evidence will be sufficient.
1353. What the carrier may show.
1354. Rule that burden of proof is upon carrier to show no negligence.
1355. Rule that burden of proof as to negligence is upon the shipper.
1356. Importance of question.
1357. Burden of proof where property injured consists of live-stock.
- V. THE MEASURE OF DAMAGES.
1358. Difference in measure between actions of tort and contract.
1359. The measure of damages for not accepting and carrying the goods.
1360. The measure of damages for the loss of the goods.
1361. Same subject—Exceptions to the rule.
1362. Measure of damages for injury to goods during transportation.
1363. Same subject—Measure of damages where goods not intended for sale or have no market value—Family portrait—Second-hand goods — Building plans.
1364. Same subject—How when amount of loss limited by contract.
1365. Right of consignee to refuse to receive injured goods.

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| <p>§ 1366. Damages for delay in the transportation and delivery.</p> <p>1367. Same subject — Special damages—Notice of special circumstances must be given to carrier when contract is made.</p> <p>1368. Same subject — Notice given after contract to carry has been performed.</p> <p>1369. Damages for delay in transporting articles intended for use in business.</p> <p>1370. Damages when carrier refuses to perform his contract to accept and carry the goods.</p> | <p>§ 1371. Same subject.</p> <p>1372. Delay not a conversion of the goods — Nor loss through mere non-feasance.</p> <p>1373. Damages for delay where the goods are not for sale as merchandise.</p> <p>1374. Measure of damages for conversion of the goods — Mitigation of damages.</p> <p>1375. Damages for injury to, or delay in the shipment of bodies of deceased persons.</p> |
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I. THE PARTIES.

Sec. 1304. (§ 720.) Who may sue the carrier for loss of or damage to the goods.—When the carrier has subjected himself to liability for the loss of the goods or for injury done to them while in his custody, and it becomes necessary to compel him to make compensation to the injured party by an action at law, the first question to be determined is, in whose name the action must be brought. This is, however, a question about which there can be but little difficulty. The presumption of the law is that the party to whom the goods are consigned is their owner and the person who is entitled to sue for the damage, and the action should in most cases be commenced in his name.¹ But notwithstanding the presumption, it by no means necessarily follows that the consignee is in fact the owner, or that he is in any wise interested in them, or that he is the only party entitled to sue the carrier for the loss or damage. They may have been sent to him through the carrier without his knowledge or procurement, and solely at the risk

1. *United States Mail Line Co. also, Railroad Co. v. Allgood*, 112 *v. The Manufacturing Co.*, 101 Ala. 163, 20 So. Rep. 986, citing Ky. 658, 42 S. W. Rep. 342. See, *Hutchinson on Carr.*

of the consignor, and the question at whose risk they were sent will usually determine the further question, to whom they belonged, and who is the proper person to sue for their loss or damage in case it should occur. For the person who takes no risk in the transportation or in the bailment of the goods can have no interest in them, and if, having no interest in them, he were allowed to recover from the carrier, such recovery, according to the rules of law, would be no-protection to the carrier against another recovery by the owner or interested party.

Sec. 1305. (§ 721.) One having special property may sue.—

It has therefore been said that, as a general rule, a mere servant or agent with whom the contract has been made on behalf of another, and who has no direct interest in the transaction, cannot support an action thereon, though it would be otherwise if he have a beneficial interest in the performance of the contract, or a special interest or property in the subject-matter of the agreement.² Thus, a factor, a broker, a warehouseman, a carrier, or any person employed to perform service in respect to the goods of another with which he is intrusted for that purpose, may maintain an action for the recovery of them, or for any damage done to them whilst in his charge; as in the case of the laundress who undertook to send home to her employer his linen by the defendant's cart, and on its way part of it was stolen or lost, for which she sued. It was objected on the part of the defendant that the action was misconceived, and ought to have been brought in the name of the owner of the linen; but the objection was overruled on the ground that under the circumstances the plaintiff retained a special property in the goods as bailee, sufficient to support the action.³

2. *Sargent v. Morris*, 3 Barn. & Ald. 277; *Evans v. Marlett*, 1 Ld. Raym. 271; *Tyler v. Freeman*, 3 Cush. 261; *White v. Bascom*, 28 Vt. 268; *Harker v. Dement*, 9 Gill, 7; *Little v. Fossett*, 34 Me. 545; *Boston, etc. R. R. v. War-*
- rior Mower Co.*, 76 Me. 251; *Mis-*
souri, etc. R'y Co. v. Implement
Co., — Kan. —, 85 Pac. Rep.
408.
3. *Freeman v. Birch*, 3 Q. B.
492.
- A bailee in possession of prop-

Sec. 1306. (§ 722.) Owner may sue.—But in such cases the action may also be brought by the owner of the goods. For the person who has the special property in the goods is the agent of the general owner, and it is a well-established rule of law that, whenever the mere agent contracts on behalf of the principal, or in reference to his property, the principal may maintain an action upon the contract, although he may not have been disclosed to the other party at the time it was made;⁴ and it is obvious that the owner may maintain the action for damage to his property whilst in the hands of his agent, or of another to whom such agent has, in turn, intrusted it; and this has been repeatedly determined in actions against the carrier by the general owner of the goods.⁵ Either the general or special owner, or both of them, may sue in such cases; but a recovery by one of them will be a bar to any subsequent action by the other, and satisfaction made to one will be satisfaction to both.⁶

erty who ships it by a common carrier has such a special interest in it as will enable him to maintain an action against the carrier for its loss. *Express Co. v. Council*, 84 Ill. App. 491.

In a suit by a husband for lost goods, where a portion of the goods in question belonged to his wife as her individual property, it was held that the husband had a special property in the goods, and a beneficial interest in the recovery therefor, sufficient to entitle him to maintain the action, and this in a state where the code required all suits to be prosecuted in the name of "the real party in interest." *Denver, etc. R. R. v. Frame*, 6 Col. 382. And a consignee of goods, to be sold on commission, and for which he has accepted a draft, and received a bill of lading, may recover from the carrier for an injury to the goods on account

of delay, even though the delay was made at the instance of the consignor. *Ober v. Railroad*, 13 Mo. App. 81.

4. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Ford v. Williams*, 21 How. 287; *Sims v. Bond*, 5 B. & Ad. 389; *Sanderson v. Lamberton*, 6 Binn. 129; *Railway Co. v. Hochstim*, 67 Ill. App. 514; *Baughman v. The Railroad*, 14 Ky. Law Rep. 268; *Trimble v. The Railroad*, 57 N. Y. Supp. 437, 39 App. Div. 403; *s. c. affirmed* in 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115.

5. *Elkins v. The Railroad*, 19 N. H. 337; *Nicolls v. Bastard*, 2 Crompt., M. & R. 659. Where the action is in tort, the one who is injured may sue in his own name. *Chesapeake, etc. Co. v. Merchants, etc. Bank*, — Md. —, 63 Atl. Rep. 113.

6. *Green v. Clark*, 13 Barb. 57; *s. c.* 12 N. Y. 343; *Steamboat*

Sec. 1307. (§ 723.) Person making contract with the carrier may sue.—Upon the authority of *Dawes v. Peck*⁷ it has been frequently held that the question whether the consignor or the consignee is the proper party to sue must be governed entirely by the question in whom the legal title to the property is vested. But this opinion is now generally dissented from. The person in whom the property in the goods is vested is, it has been said, the proper party to bring the action; but then he is not so because the property is vested in him, but because from that circumstance the law presumes that he is the party who really contracts with the carrier, and that any other person employing the carrier acts only as his agent.⁸ In other words, the owner of the goods is the person who, by presumption of law, makes the contract with the carrier. But if it be shown that another person has made the contract, whether he have any special property in the goods or not, he may maintain the action.

Sec. 1308. (§ 724.) Same subject—Even if plaintiff have no interest in goods—Or upon verbal contract.—This subject was very elaborately and learnedly discussed by Shaw, C. J., in the case of *Blanchard v. Page*.⁹ The facts were that the plaintiffs in the action against the carrier were merchants in the city of Boston, and having sold goods to another party, for which they were paid by him, undertook to ship them to him. Upon delivering them to the carrier, they took from him a bill of lading purporting to be a contract with the plaintiffs to carry the goods according to their directions, which were to carry and deliver them to the purchaser. The goods were lost, and an action was brought by the shippers against the carrier for their value upon the contract in the bill of lading. It was admitted that the plaintiffs had no interest in the goods at the time of shipment, and it was therefore contended that they could not maintain the action. But it was held that, inde-

Farmer v. McCraw, 26 Ala. 189;
Denver, etc. R. R. v. Frame, 6
 Col. 382.

8. *Gibson, J., in Griffith v. Ingledew*, 6 S. & R. 429.

9. 8 Gray, 281.

7. 8 T. R. 330.

pendently of any interest or property in the goods, the action might well be maintained upon the contract; and this position was sustained by an argument, both upon general principles and upon authority, which seems unanswerable. And in a subsequent case in the same court,¹⁰ the principle was extended to a case in which there was no bill of lading or receipt, nor other writing evidencing the contract, and the action was held to be maintainable by the consignor, who had neither interest in the property nor an express contract with the carrier.¹¹

Sec. 1309. (§ 725.) Same subject—States following this doctrine.—These cases have been approved and followed by the courts of Wisconsin,¹² Illinois,¹³ Missouri,¹⁴ Virginia¹⁵ and

10. *Finn v. The Railroad*, 112 Mass. 524.

11. The point was, however, ruled the other way by Woods, J., in *Blum, Frank & Co. v. The Caddo*, 1 Woods, 64. The case was one where the goods had been sold by the plaintiffs on a credit to the consignees and shipped to them by the plaintiffs. It was held that, as no title remained in the vendors, they could not maintain the action against the carrier for the loss of the goods. No reference is made in the case to the bill of lading or to the contract of affreightment, but the decision is rested entirely upon the question of the right of property, and it was said that "the decided weight of authorities is now in favor of the proposition that the person having the right of property and the right of possession is the one to sue, whether consignor or consignee." If by this was meant that he is the only one who can sue, as was decided in the case, it cannot be admitted to be correct. See, also, *Meigs v. Hagan*, 86 Fed. 926, which ap-

proves and follows *Blum, Frank & Co. v. The Caddo*, *supra*.

12. *Hooper v. The Railway*, 27 Wis. 81.

13. *Illinois, etc. R. R. v. Schwartz*, 13 Ill. App. 490. In this case the consignor, Schwartz, received from the railroad company a bill of lading which stated that the corn shipped was to be delivered to the consignees, Cobb, Christy & Co., on the account of one Fallis. Fallis was the owner of the corn as soon as it was loaded, and after the loading Schwartz immediately turned the bill of lading over to him. The corn became heated and spoiled after it was delivered to the railroad and was never delivered to the consignees. Higbee, J., in delivering the opinion, referred to the conflict between *Blanchard v. Page* and *Dawes v. Peck*, and, approving and following the rule established in the former case, said: "The fact that it [the bill of lading] states that the corn was to be delivered on the account of Fallis does not render it any the less the contract of the par-

Mississippi,¹⁶ and in the latter state it was held that the action might be maintained by the shipper or consignor, who had no property, either general or special, in the goods, and had incurred no risk in the bailment, although it was provided by statute that every action should be brought in the name of the real party in interest. "The shipper," it was said, "is a party in interest to the contract, and it does not lie with the carrier who made the contract with him, to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee and for his benefit." So in *Carter v. The Railroad*,¹⁷ the supreme court of Georgia, after reviewing the cases on the subject, announced itself in favor of the doctrine that the party making the contract with the carrier, although not the actual owner of the goods, was entitled to maintain an action upon the contract for their loss. "In such a case," said the court, "the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that, where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as

ties making it; and although Fallis, the owner of the corn, could sue in case for the non-performance of the common-law duties imposed upon the carrier, no good reason appears why an action of *assumpsit* cannot be maintained in the name of the plaintiff for the benefit of the owner upon the contract made with him." See, also, Ohio, etc. R. R. v. Emrich, 24 Ill. App. 245; North Line Packet Co. v. Shearer, 61 Ill. 263.

14. Atchison v. The Railway, 80

Mo. 213; Reynolds v. The Railroad, 85 Mo. 90; Hance v. The Railroad, 62 Mo. App. 60; s. c. 56 Mo. App. 476.

15. Spence v. The Railroad, 92 Va. 102, 22 S. E. Rep. 815, 29 L. R. A. 578, citing Hutchinson on Carr.

16. Southern Express Co. v. Craft, 49 Miss. 480.

17. 111 Ga. 38, 36 S. E. Rep. 308, 50 L. R. A. 354, citing Hutchinson on Carr. See, also, Railway Co. v. Marchman, 121 Ga. 235, 48 S. E. Rep. 961.

the trustee of an express trust. It would seem to follow necessarily from this that a recovery by the consignor for a breach of the contract would be a bar to an action by the owner in tort for the injury done him."

Sec. 1310. (§ 726.) Same subject—Doctrine supported by English cases.—In support of the position taken in these cases, the opinion of the lord chancellor in an English case is referred to, in which it was said that, where the consignor has made a special contract for the carriage, he is liable for the freight, and may maintain an action against the ship-owner if the goods are lost or damaged whilst in his charge, and in which, after a review of the authorities, it was said that they established the proposition "that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, he is the proper person to bring the action, yet, if the consignor made a special contract with the carrier, the special contract supersedes the necessity of showing the ownership in the goods, and the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee."¹⁸

Sec. 1311. (§ 727.) Same subject—Advantage of this rule.—This rule, which allows the consignor to sue upon the con-

18. *Dunlop v. Lambert*, 6 Cl. & Fin. 600. And see the dissenting opinion of C. J. Gibson in *Griffith v. Ingledew*, 6 S. & R. 429, which was an action on the case against the carrier for negligence in the carriage of goods, by the shipper. Conceding that the bill of lading vested the property in the consignee, and that he might have maintained an action of trover, or an action founded on property, the distinguished judge took the position that the action in that case was not founded on property, but on contract, and that therefore the shipper was the proper party to sue, and not the consignee, to whom no interest in

the contract had passed with the property; citing, in support of his position, *Davis & Jordan v. James*, 5 Burr. 2680, and *Moore and others v. Wilson*, 1 Term, 659. And see *Joseph v. Knox*, 3 Camp. 320; *Carter & Nye v. Graves*, 9 Yerger, 446; *Krulder v. Ellison*, 47 N. Y. 36; *Opinions of Thompson and Livingston, JJ.*, in *Potter v. Lansing*, 1 Johns. 224; *North Line Packet Co. v. Shearer*, 61 Ill. 263.

See, also, *Rosenbloom v. The Railway*, (Canada) Rap. Jud. Que. 16 C. S. 360; *Aubry-Le Revers v. The Railway*, (Canada) Rap. Jud. Que. 12 C. S. 128.

tract of affreightment, whether he has any property or interest in the goods or not, certainly has the advantage of simplicity in its favor, as it renders it unnecessary, when the action is brought by him, to inquire into the question of property, if a contract with him can be shown. And it agrees with the theory upon which the action is allowed to be maintained by the owner of the goods, whether consignor or consignee, as this is based entirely upon the presumption which the law makes, that the contract is with him. If, therefore, it can be shown that the contract was not with such owner, but with another as his agent, it would seem that there could be no valid reason why the action might not be maintained in the name of such agent; and this would, indeed, be according to the general rule of law as to contracts with agents on behalf of their principals. Of course the consignor, in such a case, would sue as the agent or trustee of the consignee or owner, and any recovery by the former would inure to the benefit of the latter.¹⁹

Sec. 1312. (§ 728.) Conclusions from previous cases.—It would, therefore, seem that the consignor who has made a special contract with the carrier may always maintain an action upon it for the loss of or damage to the goods, regardless of the question of his interest or property in them. Nor would it appear to be material whether the freight upon them had been paid by him or by another. If not paid, he is the party to whom the carrier may look for its payment,²⁰ in case the consignee should refuse to accept the goods or to pay the carrier's charges upon them. And if paid, no matter by whom, the payment would be a sufficient consideration for the contract with the consignor.

Sec. 1313. (§ 729.) Contract need not be in writing to enable shipper to sue.—Nor does there seem to be any good reason why the contract, to entitle the shipper to maintain the action, should be special and in writing. This merely has the effect of changing the character of the proof of the contract,

¹⁹ Illinois, etc. R. R. v. Schwartz, 13 Ill. App. 490. ²⁰ Ante, §§ 807, 809.

but in no respect changes its legal effect. The conclusion would therefore seem to be irresistible, that if a contract by a bill of lading or receipt will confer the right of action upon the consignor, the same effect should be given to the implied contract which arises in his favor, upon the delivery by him to the carrier for transportation according to his directions, without a special agreement, as was held in the case of *Finn v. The Railroad*.²¹

Sec. 1314. (§ 730.) The rule of these cases stated—Only owner may sue in tort.—The law is, therefore, according to these cases, that whenever the carrier accepts the goods from the shipper or consignor upon a contract, express or implied, to carry them to the consignee as directed by the consignor, the right of action for the damages accrues to such shipper or consignor immediately upon their loss or injury, without regard to his interest or ownership, and that if he have no interest in them, he may yet recover the full damages in trust for the consignee or other person to whom the goods may have belonged. The action, however, where he has no property or interest in the goods, must rest exclusively upon the contract, and he will be confined to *assumpsit*, and could not sue in an action *ex delicto* for the breach of duty by the carrier.²²

21. 112 Mass. 524; Tex. Pac. R'y Co. v. Nicholson, 61 Tex. 491. Mobile, etc. R'y v. Jurey, 111 U. S. 584, was an action against the carrier, by the consignor, for the use of an insurance company. The insurance company had previously paid to the consignor the amount of his damages. There was a written contract in the form of a bill of lading, which had been delivered by the carrier to an agent of the consignor, at the time of shipment. It was claimed by the consignee, however, that this did not express the terms of the transportation contract, which he had made

verbally with the carrier, and he based his right to recover upon this verbal contract. It was held that the giving of the written bill of lading did not preclude the consignor from showing the terms of the verbal contract, and from recovering upon it.

22. *Wetzel v. Power*, 5 Mont. 214.

An action founded in tort for damage done to live stock can be maintained only by the real owner; and this is true although he may not be named in the contract of shipment. *Fast v. The Railway*, 77 Miss. 498, 27 So. Rep. 525.

Sec. 1315. (§ 731.) Rule that only owner can sue.—Many of the cases, however, following the rule laid down in *Dawes v. Peck*,²³ have thrown the contract of affreightment entirely out of view, and have made the right of the party to maintain the action depend entirely upon his interest in the subject-matter, and have consequently denied to the shipper the right of action if it appeared he had parted with his interest in the goods, and have held that the right of stoppage *in transitu* was not such an interest as to give him this right.²⁴ “We think,” said Irvine, C., in *The Railroad Co. v. Metcalf*,²⁵ “it would be an intolerable hardship on the carrier to hold that an action would lie by the consignor merely because he is the consignor, without any averment that he is the owner, that he is liable for the goods, or that he has sustained special damage. The cases holding that, in the absence of such averments the consignor may sue, are not, as we believe, in accordance with the principles of law established in this state. Lord Mans-

The contingent right of stoppage *in transitu* will not be a sufficient interest in the goods to entitle the consignor to sue in tort. *Railway Co. v. Lewis*, 89 Ill. App. 30.

23. 8 T. R. 330.

24. Where title to the goods has passed to the consignee by their delivery to the carrier, the consignor cannot maintain an action against the carrier for their conversion. *McLaughlin v. Martin*, 12 Colo. App. 268, 55 Pac. Rep. 195.

See, also, *Blum et al. v. The Caddo*, 1 Woods, 64; *Tindall v. Taylor*, 28 Eng. Law and Eq. 210; *Potter v. Lansing*, 1 Johns. 215; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Brown v. Hodgson*, 2 Camp. 36; *De Wolf v. Ins. Co.* 20 Johns. 214; *Griffith v. Ingle-dew*, 6 S. & R. 429; *Law v. Hatcher*, 4 Blackf. 364; *Green v.*

Clark, 12 N. Y. 343; *Krulder v. Ellison*, 47 N. Y. 36; and see *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *South, etc. R. R. v. Wood*, 72 Ala. 451; *Pennsylvania Co. v. Poor*, 103 Ind. 553; *Dressner v. Manhattan Delivery Co.*, 92 N. Y. Supp. 800; *Sweeney v. Waterhouse & Co.*, — Wash. —, 81 Pac. Rep. 1005.

In an action by the consignor against a common carrier for damage to goods, the ownership of the goods must be alleged. *Butler v. The Railroad*, 18 Ind. App. 656, 46 N. E. Rep. 92. A railroad company can insist that the person who seeks to charge it for the loss of goods must show that he is the one who has suffered injury by the loss. *Union Feed Co. v. Pac. Clipper Line*, 31 Wash. 28, 71 Pac. Rep. 552.

25. 50 Neb. 452, 69 N. W. Rep. 961.

field, in *Davis v. James*,²⁶ based the right of the consignor to sue on the fact that the consignor was to pay the freight, and that the contract for carriage was with him. This principle was more clearly stated by Lord Ellenborough in *Joseph v. Knox*,²⁷ recovery being placed on the ground that the consideration moved from the consignor, to whom the promise was made. But it is well settled here that a third person, for whose benefit a promise is made, although not a party to the consideration, may sue thereon. Prior to the establishment of this rule, all benefits from the express contract of carriage would be lost unless the consignor himself might sue. But the establishment of the modern principle undermines the whole reasoning on which the decisions of Lord Mansfield and Lord Ellenborough were based. The American cases taking a similar view are based largely on the learned opinion of Chief Justice Shaw in *Blanchard v. Page*.²⁸ An inspection of that case will show that it is founded on the same obsolete reasons. All the cases hold that the presumption is that the consignee is the owner, and all the cases holding that the consignor may sue are based, so far as we can ascertain, on one of three grounds: first, that it was made to appear from the pleadings and proof that the consignor was the owner, or second, that the consignor was liable to the consignee, or suffered special damage, or third, cases based solely on the doctrine of privity of contract which, we think we have demonstrated, does not apply in this state. . . . We cannot see how the consignor can be conceived to be the trustee of an express trust. He may, strictly speaking, be a person with whom a contract is made for the benefit of the consignee. But this is true in every case where a promise is made for the benefit of a third person. Our law permits the third person to sue. Could a judgment in favor of the promisee be pleaded in bar of an action by the real party in interest? We think not. So unless it is shown by the pleadings and proof that the one suing for the

26. 5 Burrows, 2680.

28. 8 Gray, 281.

27. 3 Camp. 320.

loss of goods is the owner, or that he was liable for their loss, or that he has sustained special damage, he may not maintain an action." But however it may be when the consignor has no property or interest in the goods, it is universally admitted that if he have any such interest beyond the contingent right to stop them *in transitu* upon the insolvency of the vendee, he may maintain the action.²⁹

Sec. 1316. (§ 732.) Rule that mere agent without interest cannot sue.—It therefore frequently becomes important to determine whether, under the particular circumstances, the consignor has parted with his entire interest or property in the goods by the delivery to the carrier. If the consignor is the mere agent of the consignee, and has shipped the goods according to the consignee's directions, he will have no further interest in them; and being under no liability, inasmuch as he has obeyed the directions of the owner, he cannot maintain an action against the carrier for their return to him in case the consignee cannot be found. Thus, where money was collected by an agent for a principal, and was sent by the agent by express to the address of the principal, as the latter had directed, but could not be delivered because the consignee could not be found, it was held that the agent had no right to demand a return of the money to him by the express company, nor could he recover its value in an action for its conversion after a demand upon the company and its refusal to return it to him.³⁰ The action, however, was trover, and the agent, having complied with the instructions of his principal in sending the money, as was found, had no further property, general or special, in it, after he had delivered it to the carrier according to these instructions; but if the money had been lost, and the

29. *W. & A. R. R. v. Kelly*, 1 N. Y. 335; *East Tenn. & Va. R. Head*, 158; *Price v. Powell*, 3 N. R. v. Nelson, 1 Cold. 272; *Mis- Y. 322*; *Sanford v. Railroad*, 11 souri, etc. R'y Co. v. Implement Cush. 155; *Coats v. Chaplin*, 3 Q. Co., — Kan. —, 85 Pac. Rep. B. 483; *Freeman v. Birch*, *id.* 408.
492; *Sargent v. Morris*, 3 B. & 30. *Thompson v. Fargo*, 49 N. Ald. 277; *Congar v. The Railroad*, Y. 188.
17 Wis. 477; *Sweet v. Barney*, 23

agent had sued upon his contract with the carrier, a different question would have been presented, and, according to the cases hertofore cited, he could have maintained his action for the failure in making a safe delivery, to do which is always a part of such contract, either expressly or by implication.³¹

Sec. 1317. (§ 733.) When consignee may sue.—Whenever the consignor in the shipment of the goods has obeyed the instructions of the consignee, as where the consignee has directed them to be sent by a particular carrier, or by a particular mode of conveyance,¹ or if he has ordered the sending of the goods

31. The contest in this case seemed to be, which was entitled to the money for which the owner could not be found, the attorney who had collected it or the express company by which he had undertaken to send it to his client, pursuant to directions. The effect of the decision of the court was to give it to the company, upon the ground that the attorney, having bailed the money to it as directed, had no further special property in it, and incurred no risk in its transmission, and could not therefore sue for its recovery. The company was the bailee of the attorney, though selected by the client, the contract being with him as the agent, it is true, of the client; but it is a well-settled rule that such contracts may be enforced in the name of either the agent or the principal, and it would therefore be optional with the agent, if no objection is made by his principal, to treat the bailee as his own. *So. Ex. Co. v. Craft*, 49 Miss. 480. If this be so, and we apply another equally well-settled rule, that when the purpose of the bailment has been accom-

plished or has become impossible, and the bailee still retains the property, he cannot dispute the title of his bailor as long as no adverse claim is set up to the property, the argument would be at least plausible that the plaintiff, under the facts of this case, should have been held entitled to a recovery. And such was the opinion of the supreme court from which it was appealed. *s. c.* 58 Barb. 575. If the action had been upon the contract, the plaintiff would have been clearly entitled to recover, according to the case of *Blanchard v. Page*, and the other cases heretofore cited in connection with it. But as the attorney was the bailor, it would seem that the form of the action, whether in *assumpsit* or in *trover*, could make no difference. The case is somewhat like *Joseph v. Knox*, 3 Camp. 320, and *Davis v. James*, 5 Burr. 2680, in both of which it was held that the plaintiff was entitled to recover.

Of course the recovery, if allowed, would be for the benefit of the client.

1. *Krulder v. Ellison*, 47 N. Y. 36; *Arbuckle v. Thompson*, 37

without designating the particular carrier or mode of conveyance, leaving it to be inferred that they are to be sent by the usual or customary mode, and the consignor sends them in that manner,² the title to the goods will pass to him as soon as they are delivered to the carrier, and he will be the proper party to sue the carrier for their loss or damage. And it may be stated as a well settled rule that if the goods are delivered to the carrier on behalf of the consignee, and at his request or by his direction, either express or implied, and no other fact appears, the legal presumption will be that the property in the goods immediately on such delivery becomes vested in him, and that he is the proper party to bring an action against the carrier, either in *assumpsit* in his own name upon the contract with the consignor as his agent, or in case for the breach of duty on the part of the carrier, or in the name of the agent for his use upon the special contract of affreightment.³ But, after all, the question whether the property in the goods has passed to the consignee by a delivery to the carrier will depend upon the intention of the transaction, and this may always be shown.⁴ And if the consignee, after the goods have been destroyed in transit, purchases them from the owner, it has been held that such consignee may maintain an action in his own name against the carrier for damages. And the fact that the goods were destroyed before the consignee's purchase was held to make no difference.⁵ Where the consignee has refused to receive

Penn. St. 170; *People v. Haynes*, 14 Wend. 546.

Where property is delivered to the carrier who is employed by the purchaser to receive it, the purchaser and not the seller is the proper party to sue for its loss. *Meigs v. Hagan*, 86 Fed. 926.

2. *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Dutton v. Solomonson*, 3 Bos. & P. 582.

3. *Everett v. Saltus*, 15 Wend. 474; *Richardson v. Dunn*, 2 Q. B.

218; *Bonner v. Marsh*, 10 Smedes & M. 376; *Bank of Irwin v. Ex. Co.*, — Iowa, —, 102 N. W. Rep. 107; *Burriss & Hanie v. The Railway*, 105 Mo. App. 659, 78 S. W. Rep. 1042; *Frankfurt v. Weir*, 83 N. Y. Supp. 112, 40 Misc. Rep. 683; *Dyer v. The Railway*, 51 Minn. 345, 53 N. W. Rep. 714.

4. *Ante*, § 194; *Bonner v. Marsh*, *supra*.

5. *Kirkpatrick v. The Railway*, 86 Mo. 341.

the goods from the carrier, under the influence of a mistake, he may sue for a refusal to deliver them upon his subsequent demand, when they are still in the possession of the carrier, and no other rights have intervened.⁶

Sec. 1318. (§ 734.) When consignor the proper party.—But if the consignor has shipped the goods without any instructions from the consignee;⁷ or if he has sent his own goods to the consignee merely to be approved, it being understood that the property in them is not to pass to the consignee until he has inspected and approved them;⁸ or if the consignor has agreed

6. *Bacharach v. Chester Freight Line*, 133 Penn. St. 414, 19 Atl. Rep. 409. In this case, consignors, in pursuance of an order taken by one Talcott, their agent, shipped to the consignees certain goods. At the same time they took from the defendant carrier a shipping receipt, containing the condition that the goods should be held by the carrier for the general freight account owing by consignors. At this time the consignors owed the carrier for freight \$124.46. When the goods were first offered for delivery, the consignees, under the impression that they came from another shipper, refused them. Subsequently the consignors failed. Then Talcott, consignors' agent, to whom the consignors were indebted, induced the consignees to retract their refusal to receive the goods, and to allow him, Talcott, to use their name in an action of replevin for the goods, that he might indemnify himself for the consignors' indebtedness to him. The carrier held the goods for their general freight account against consignors. Consignees never paid or accounted for the goods in any way. In

the meantime, and while the goods were in the carrier's possession, another creditor of consignors obtained judgment, levied on the goods and bought them in at the constable's sale. The goods were replevied and delivered to Talcott, and the court permitted consignees to recover, saying: "The attempt to subject the goods to a lien for prior freights due from consignors on other consignments was without legal right. . . . As to the right of these plaintiffs to maintain the action, there can be no question, and whether Talcott has an interest in their recovery is not a matter of any concern to the defendant, who is a mere carrier. The plaintiffs were the consignees, and, as against the carrier, they had a clear right of recovery, after their notice to deliver the goods and a refusal by the carrier." It was also held that the judgment creditors derived no title at the constable's sale.

7. *Hays v. Stone*, 7 Hill, 128; *Stone v. Hayes*, 3 Denio, 575; *Wilson v. Wilson*, 26 Penn. St. 393.

8. *Swain v. Shepherd*, 1 Moody & R. 223; *Goodwyn v. Douglass*, 1

to deliver them to the consignee at the particular place to which they are consigned,⁹ in all these cases the goods are at the risk of the consignor until they have been delivered to the consignee, and may therefore be said, at least for the purpose of maintaining his action for their loss or injury, to belong to the consignor. So goods may be shipped to the order and on account of the consignee as purchaser, and yet his right to the possession of them may be incomplete; as where the direction to the carrier is not to deliver the goods until payment of the price or a compliance with some other condition by the consignee. In such cases, of course, the title to the goods remains in the consignor until the conditions upon which delivery is to be made have been complied with, and he will be the proper party before the title has passed to the consignee to sue the carrier for their loss or damage.¹⁰ And where a creditor living at a distance from his debtor requests the payment of the debt, without giving specific instructions as to how the money shall be sent, and the debtor sends it by an express company, and it is lost in transit, the consignor is the proper party to maintain an action against the company for its recovery.¹¹

Sec. 1319. (§ 735.) Same subject—Where sale is void, or where contract of sale is rescinded, consignor should sue.—And if, from the fraud of the consignee, as if he procure the sending of the goods by false representations, or with the design of obtaining the goods without paying for them,¹² or if from a

Cheves, 174. See, also, *Jarrett v. The Railway*, 74 Minn. 477, 77 N. W. Rep. 304.

9. *Railroad Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. Rep. 71; *Railway Co. v. Scott*, 4 Tex. Civ. App. 76, 26 S. W. Rep. 239.

10. *Abbott on Ship*, 326; *Wilms-hurst v. Bowker*, 5 Bing. N. C. 541; *Brandt v. Bowlby*, 2 B. & Ad. 932; *The Merrimac*, 8 Cranch, 317; *Ludlow v. Bowne*, 1 Johns. 1; *Mitchell v. Ede*, 11 Ad. & El. 888.

11. *Bernstine v. Express Co.*, 40

Ohio St. 451. It was held in this case that the consignor was bound to pay his creditors, the consignees, in person. That he could only be relieved from this duty by the express or implied authority of his creditors to pay some one else. That the request to send the money was not such authority, and that the ownership of the money remained in him until it was actually delivered to his creditors.

12. *Duff v. Budd*, 3 B. & B. 177; *Stephenson v. Hart*, 4 Bing. 476.

failure to comply with the requirement of the statute of frauds of part payment, or of a memorandum in writing to make the sale of goods above a certain value binding, the sale is void,¹³ no actual sale has taken place so as to transfer the right of property and the risk of the loss from the consignor to the consignee, and the property will still remain in the consignor, notwithstanding the delivery to the carrier, and he will be the proper party to sue. So if the consignee refuses to receive the goods because they have been injured while in the carrier's possession, and they are thrown back on the hands of the consignor, the latter will have the right to maintain an action for the recovery of such damages as he has thereby sustained.¹⁴

Sec. 1320. (§ 736.) Conclusions on the subject.—It may, therefore, be concluded: First, that when the risk of the safe transportation of the goods is upon the consignor, he will be considered as the owner for the purpose of maintaining an action against the carrier for their loss or injury. Secondly, that whether he retains any property in the goods or not, if the contract for the transportation by the carrier is directly with him, he may maintain the action upon such contract in his own name for the failure safely to carry and deliver to the consignee; but that the recovery in such a case will be for the benefit of the consignee, if he was the real owner of the goods. Thirdly, that the law will presume, when nothing appears to the contrary, that the consignee is the owner of the goods, and that the contract for their transportation was made with him as such owner; but that this presumption may be rebutted by showing the actual facts or the intention of the parties to the

13. *O'Neil v. The Railroad*, 60 N. Y. 138; *Krulder v. Ellison*, 47 *id.* 36; *Coombs v. The Railway*, 3 Hurl. & N. 510.

14. *Railway Co. v. Commercial Guano Co.*, 103 Ga. 590, 30 S. E. Rep. 555. In this case it was said that, if the consignor has completely complied with his contract with the purchaser by a delivery

of the goods to the carrier, and they afterwards become damaged while in the carrier's hands, it is within the power of the consignor and consignee by mutual consent to rescind the contract, and that it does not lie in the mouth of the carrier to complain of such rescission when it was brought about by his own wrong.

contrary. Fourthly, that the consignee who had no property in the goods, either general or special, and incurred no risk in their transportation, cannot maintain an action for their loss or damage.

II. THE FORM OF ACTION.

Sec. 1321. (§ 737.) The form of action.—A great deal of importance was formerly attached to the subject of the form of action adopted in suits against the carrier for damages for his failure to carry and deliver the goods safely. It has become, however, from the radical changes in the mode of pleading, which have now been almost universally adopted in this country, a matter of comparatively little importance. But as the former distinctions between the two classes of actions, which formerly prevailed in the prosecution of the remedy of the injured party against the carrier, are still of some importance in the illustrations which they afford of the nature of his responsibilities, and as the former rules of pleading are still partially retained in some of the states, and remain almost wholly unimpaired in perhaps a few of them, it is still a subject of sufficient importance to merit our attention.

Sec. 1322. (§ 738.) Original theory as to carrier's obligation.—Until within a comparatively recent time the obligation of the common carrier of goods was supposed to result entirely from a public duty, implied by the law, and which, upon grounds of public policy, as we have seen, was increased into an obligation to carry safely, without excuse or exception, save for such losses as might be occasioned by an act of God or of the king's enemy. His character as *quasi*-public servant or officer, as it was designated, was supposed to put his business upon a different footing from that of persons engaged in other vocations. His liability was of an extraordinary and exceptional kind, growing out of his obligations to the public, and justified on grounds of public policy, from the apprehension of his combining with thieves and robbers, to the undoing of all persons who might be obliged to have dealings with them, and

yet in such a clandestine manner as would make a discovery of his villainy impossible.¹ The idea of contract, or of the obligations growing out of it, was therefore never associated with the question of his liability. All actions against him were therefore for a breach of this duty, and were said to be founded upon the custom of the realm, which was but another term for the common law. Such actions were said to be *ex delicto*, in tort, or actions on the case, all of which terms express the same idea, and were meant to distinguish such actions from those based upon contract.

Sec. 1323. (§ 739.) First recognition of the theory of the carrier's contract obligation.—The first innovation upon this doctrine is said to have been made in the case of *Dale v. Hall*² (1750), in which the declaration was not upon the custom of the realm, but upon the undertaking of the carrier, and the breach assigned was that the carrier had kept them so negligently that they were spoiled. It was therefore insisted for the defendant that the declaration was not against him as a common carrier upon the custom of the realm, but upon a particular contract, and that negligence being assigned as the breach, was the gist of the action. But it was answered that the declaration was the same in effect as if it had been upon the custom, and that, being sued as a common carrier, the defendant could not show that there had been no negligence; for, as was said, “everything is negligence in a carrier that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the king's enemies; and a promise to carry safely is a promise to keep safely.”

Sec. 1324. (§ 740.) Action on the case.—Since this recognition of the right of the bailor of the goods to sue upon his contract with the carrier, the two forms of action, the one in *assumpsit* for breach of contract and the other in tort for the breach of duty, have been adopted indifferently, or as best

1. *Coggs v. Bernard*, Ld. Ray- 2. 1 Wilson, 281.
mond, 909. 1 Sm. L. Cas. 283.

suited the purposes of the pleader.³ Certain well-recognized differences, however, exist between them, which are regarded as important in deciding whether the one or the other shall be resorted to. Where, for instance, there is any doubt as to who should be made defendants, the action upon the case is preferable, because in that form of action the plaintiff could not fail in his action by reason of non-joinder of others who are also liable, nor for the misjoinder of parties who should not have been sued, it being a well-known rule of pleading at common law that in tort the plaintiff shall never fail in his action because he has made too few or too many defendants, but may recover against as many of those whom he sues as are proven to be guilty, no matter how many more are joined in the same action, or how many others are shown to be liable who are not joined.⁴ Consequently, in a number of cases against carriers, both of goods and of passengers, in which the declaration was construed as being in form *ex delicto*, and not upon the contract, it has been held that a recovery against a part of those who were sued could be maintained, even when there was a verdict for the other defendants in the same action.

Sec. 1325. (§ 741.) Action in case is several and not joint.—

In *Bretherton v. Wood*,⁵ which was an action on the case against ten defendants, as proprietors of a coach, for injuries sustained by the plaintiff in consequence of negligent driving, the jury found a verdict against eight of the defendants and

3. *Spence v. The Railroad*, 92 Va. 102, 22 S. E. Rep. 815, 29 L. R. A. 578, citing *Hutchinson on Carr.*; *Central Trust Co. v. The Railway*, 70 Fed. 764; *Coles v. The Railroad*, 41 Ill. App. 607.

One with whom the carrier has made a contract for the transportation of goods may elect to sue in tort, or he may waive the tort and sue for a breach of the contract. *Denman v. The Railroad*, 52 Neb. 140, 71 N. W. Rep. 967. Although an action in *as-*

sumpsit upon the promise implied by law is maintainable, an action on the case founded in tort in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it and the resulting damage, is the more proper form of action. *Holden v. The Railroad*, 72 Vt. 156, 47 Atl. Rep. 403.

4. *Rice v. Shute, Smith's Ld. Cas.* 645, and notes.

5. 3 B. & B. 54.

in favor of the other two, and the question being whether a judgment upon such a verdict could be maintained, Dallas, C. J., said: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it. . . . The action of *assumpsit*, as applied to cases of this kind, is of modern use. If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for from the nature of the case, and the form of the action, it is several and not joint, and may be maintained against some only of those against whom it is brought." And the same rule applies in the case of the carriage of goods.⁶ And it has been decided that if a carrier in partnership is sued singly in an action *ex delicto*, he cannot plead the non-joinder of others, either in abatement or in bar to the action, or take advantage of it under the general issue; for in that form of action the plaintiff may sue one or all, at his election.⁷

Sec. 1326. (§ 742.) Advantage of declaring in case.—Another advantage of declaring in case is, that it is not necessary to state the circumstances with as much form or certainty as is required in an action of *assumpsit*;⁸ for it is a well-settled rule, that in declaring upon an executory contract, great exactness is required in setting out the contract, and if the plaintiff fail in proving it exactly as laid in his declaration, he must fail in his action.⁹ And it being a rule of pleading that counts in

6. Pozzi v. Shipton, 8 Ad. & E. 963; Tattan v. The Railway, 2 El. & El. 844.

7. Child v. Sands, Carth. 294; Gow on Part. 201; Ansell v. Waterhouse, 2 Chitty, 1; Orange Bank v. Brown, 3 Wend. 158.

8. Per Parke, B., in Wylde v. Pickford, 8 M. & W. 443.

9. Chitty on Pl. 312 *et seq.*; Weed v. The Railroad, 19 Wend. 534.

different forms of action cannot be united in the same declaration, because the same judgment cannot be rendered upon them, a still further advantage to be gained by adopting the action upon the case is that a count in trover, which is also an action *ex delicto*, may be included in the same action, whereby the plaintiff, if he fail in establishing the liability of the defendant for the loss or damage, may recover for the conversion of the goods.¹⁰

Sec. 1327. (§ 743.) Action in assumpsit.—On the other hand, in the action of *assumpsit* upon the contract of the carrier, the plaintiff has the advantage of being enabled to join the common counts in *assumpsit*, which will sometimes entitle him to recover, even when he fails in the proof of the contract which he sets out, and also gives him the opportunity of joining other causes of action to which such counts are applicable; so that if he fails in the action upon the particular contract he may yet recover upon another cause of action which may be established by his proof.¹¹ The action in this form will also survive to the personal representative of the plaintiff, as well as against the personal representative of the defendant, while the action, if in form *ex delicto*, upon the death of either plaintiff or defendant, will, according to the rules of the common law and independently of statutory provisions, abate. But in the action *ex contractu*, all the parties who are liable in damages for the wrong must be sued, and if any of them are omitted, it will be ground for plea in abatement.¹² Nor can a count in trover be joined when the action is in *assumpsit*, inasmuch as a party cannot, in the same action, sue for both a tort and a breach of the contract. To allow such an incongruity

10. *Dickon v. Clifton*, 2 *Wilson*, 319; *Govett v. Radnidge*, 3 *East*, 62; *McCahan v. Hirst*, 7 *Watts*, 175; *Dwight v. Brewster*, 1 *Pick*, 50; *Wyld v. Pickford*, 8 *M. & W.* 443.

11. *Chitty on Pl.* 114.

12. *Smith v. Seward*, 3 *Penn. St.*

342; *Govett v. Radnidge*, 3 *East*, 62; *Pozzi v. Shipton*, 8 *Ad. & El.* 963; *Walcott v. Canfield*, 3 *Conn.* 194; *Patton v. Magrath*, 1 *Rice*, 162; *Marshall v. The Railway*, 11 *Com. B.* 655; *s. c.* 7 *Eng. L. & Eq.* 519.

would be a subversion of the whole foundation of the system of common-law pleading.

Sec. 1328. (§ 744.) How character of action determined.—Notwithstanding these essential differences between actions on the case and in *assumpsit* against the carrier, it seems to have been in former times a very perplexing question how the one form of action should be distinguished from the other. The declarations in the two kinds of actions, according to approved formulas, were so nearly alike, that in many cases the astutest judges became perplexed in their efforts to find out to which class the declaration belonged. It seems, however, to be finally settled, that while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words “agreed,” “undertook,” or even the more significant word “promised,” must be treated as no more than inducement to the duty imposed by the common law, yet if there be an averment of a promise and a consideration, the declaration will be construed to be upon the contract, and not for the breach of duty.¹³ And consequently, when the word “consideration” was left out, the action was held to be in tort.

Sec. 1329. (§ 745.) Same subject.—And where the declaration simply stated that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, certain goods to be carried, without alleging either the custom of the realm, or that the defendants were common carriers, it was held, after verdict against one of the defendants only, upon

13. *Smith v. Seward*, 3 Penn. St. 342; *Corbett v. Packington*, 6 B. & C. 268; *Tallahassee Falls Mfg. Co. v. The Railway*, 117 Ala. 520, 23 So. Rep. 139, 67 Am. St. Rep. 179, citing *Hutchinson on Carr.*; *Nelson v. The Railway*, 28 Mont. 297, 72 Pac. Rep. 642; *Railway Co. v. F. W. Stock & Son*, — Va. —, 51 S. E. Rep. 161, citing *Hutchinson on Carr.*

If the language of the petition is equivocal, and there is doubt as to whether an action on contract or in tort was intended, it is to be resolved by construing it as an action in tort, rather than an action for a breach of contract. *Railway Co. v. Chicago Portrait Co.*, 122 Ga. 11, 49 S. E. Rep. 727, 106 Am. St. Rep. 87.

the proof, admitted without objection, that he was a common carrier, that, however objectionable the declaration might have been upon the special demurrer, it must be read after verdict, and in order to support it, as a declaration founded on the general custom of the realm, and therefore one in case and not upon contract.¹⁴ For every reasonable intendment will be made in favor of that construction of the pleadings in the cause which will support that which has been judicially done under them.

Sec. 1330. (§ 746.) Distinction in form of action now generally unimportant.—But although the distinction between the different forms of action may be abolished, the plaintiff may still proceed against the carrier for any injury to the goods, or for their loss, either upon the breach of duty or upon the breach of his contract. The same reasons, however, for preferring the one course to the other do not now generally exist. By statutory law in most of the states, perhaps in all of them, a recovery may be had against a part of the defendants, while there may be a verdict for the others, even when the action is upon a contract; and it has also been generally provided that actions founded upon a breach of duty, from which the plaintiff has suffered a pecuniary loss, shall survive to his personal representative. Hence, in most cases against the common carrier for the injury or loss which the plaintiff has sustained by reason of his failure to carry the goods safely, it must be a matter of almost perfect indifference to the latter whether the action be commenced with respect to the duty or to the contract.

Sec. 1331. (§ 747.) When action should be upon the contract.—There may be cases, however, in which it may be advisable to proceed upon the contract, as where the undertaking of the carrier was by special agreement, some portion of which is important in fixing liability upon the carrier, or may be an answer to an excuse or defense which he might otherwise make. For instance, if the carrier, by his contract, has agreed to waive

14. *Pozzi v. Shipton*, 8 Ad. & El. 963.

all benefit from the exceptions to his liability which the law allows him, and has warranted the safety of the goods at all events, which, as we have seen, he may do, it would be necessary for the owner of the goods, in case of their loss, to sue him upon his contract, if he would secure to himself the benefit of this warranty. But unless the contract imposes upon the carrier some duty or obligation in respect to the goods which the law itself would not impose, and which would be of some advantage to the plaintiff in the action, there could be no reason why it should be based upon the contract rather than upon the duty.¹⁵

15. It has been held in Indiana that when an action is brought against a carrier, and the complaint counts upon a breach of the common-law duty of the carrier, if the evidence shows a special contract which was not declared upon, the variance is fatal and the plaintiff cannot recover. *Lake Shore, etc., Railway v. Bennett*, 89 Ind. 457. This case was an attempt to recover for an alleged delay in the transportation and delivery of live stock, which the carrier undertook to carry under a written contract, executed by both parties, and which contract began with the recital: "That, whereas, said railway company does not and will not assume or consent, as a common carrier, to transport live stock." And then followed numerous conditions, the company substantially assuming only the duties of a private carrier. The shipper sought to hold the carrier as a common carrier, and declared in case for a breach of the common-law duty of the carrier. The plaintiff was not permitted to recover, the court, Howk, J., saying: "It was not competent for the appellee, as it

seems to us, to ignore the written contract assented to and accepted by him for the transportation of his cattle, and to attempt, in direct contravention of the provisions of such contract, to hold the appellant liable in damages as a common carrier, for an alleged breach of its common-law duty as such carrier, in the transportation of his cattle." Upon a rehearing of the case, the same court, without deciding as to plaintiff's right to sue as he had, held that its former conclusion was correct, since plaintiff could not recover whether he based his claim upon the express contract, or upon the carrier's common-law liability.

Hall v. Pennsylvania Co., 90 Ind. 459, extended the rule of *Lake Shore, etc., Railway v. Bennett*, to a case wherein the contract to carry was for carriage as a common carrier. Here there was a bill of lading delivered at shipment, which exempted the carrier from any liability to the shipper for loss by fire. The goods shipped were burned while in transit, and plaintiff, ignoring the written contract, sued upon the implied contract of a common car-

Sec. 1332. (§ 748.) When action should be for breach of duty.—On the other hand, there may be reasons for preferring the action for the breach of the common law duty of the carrier to an action upon the contract. The latter may contain terms and conditions extremely favorable to the carrier, and which, if set out in the plaintiff's declaration, might make it demurrable, unless accompanied by some explanation or statement which would destroy its effect in the particular case. It may, for example, be provided in the carrier's agreement that, unless claim be made for a loss within a given number of days from its happening, or from the date of the contract, the carrier's liability therefor shall be at an end. If the limited time has elapsed, though the plaintiff may have a legal excuse for not having made the claim within the time, as the breaking out of a war between the country of the plaintiff and that of the carrier, which made a demand impossible,¹⁶ it would be preferable to commence the action for the breach of the common-law duty, and thus put the defendant to the necessity of

rier. Howk, J., said: "When the evidence showed, as it did, that the plaintiff's sugar was delivered to and received by the appellee for transportation and delivery, under the terms of a special contract, there could be no recovery by the appellant in this action, because of the fatal variance between the case made by the allegations of the complaint and the case made by the evidence." See, also, *Indianapolis, etc., R. R. v. Remmy*, 13 Ind. 518, and *Jeffersonville, etc., R. R. v. Worland*, 50 Ind. 339; *Indianapolis, etc., Ry. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. Rep. 1138; *Baltimore, etc., Ry. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. Rep. 1106; *Stewart v. The Railway*, 21 Ind. App. 218, 52 N. E. Rep. 89; *Par-rill v. The Railway*, 23 Ind. App.

638, 55 N. E. Rep. 1026; *Pennsylvania Co. v. Walker*, 29 Ind. App. 285, 64 N. E. Rep. 473. So if the complaint sets up a special contract, a recovery cannot be had upon a breach of the common law duty; but where the complaint sets forth a special contract as a matter of inducement, such contract being void on the ground of public policy, and the common-law duty of the carrier is, in fact, relied upon, there will be no such variance as will preclude a recovery. *Railroad Co. v. McKinney*, 34 Ind. App. 402, 73 N. E. Rep. 148; *Railroad Co. v. Kevekordes*, — Ind. App. —, 73 N. E. Rep. 1135; *Railroad Co. v. Holland*, 162 Ind. 406, 69 N. E. Rep. 138, 63 L. R. A. 948.

16. *Express Co. v. Caldwell*, 21 Wall. 264.

setting up the particular stipulation in his plea, to which the plaintiff could reply the special matter of excuse, which it would have been otherwise necessary for him to allege in his declaration. So where it is made a part of the agreement that the carrier shall not be held liable, in case of loss, to a greater than a specified amount, unless a greater value was fixed at the time of shipment, it would be advisable to base the plaintiff's action upon the common-law duty, which would compel the defendant, if he intended to rely upon it, to plead the special contract, and thus enable the plaintiff to reply that the loss was occasioned by the negligence of the defendant, which, as we have seen, would, if proven, completely avoid the defense. And it may be stated, generally, that whenever the contract of affreightment contains terms and conditions which limit the liability of the carrier, or exonerate him in certain events, or from the consequences of certain accidents, without corresponding stipulations of warranty in favor of the plaintiff, as is generally the case, the action should be in case, and not upon the contract.¹⁷ And it has been held that damages for lost baggage, carried gratuitously by a railroad company, cannot be recovered in an action of *assumpsit*, but that an action in tort would lie for its negligent loss.¹⁸

. Where the declaration shows the liability of the common carrier to be for a breach of a common-law duty, an amendment charging the company upon a statutory liability is not permissible. *Exposition Cotton Mills v. The Railroad*, 83 Ga. 441, 10 S. E. Rep. 113. And where a suit was brought against a carrier on a written contract, it was held that the declaration could not be amended, by alleging that the car-

rier's agent procured the contract by fraud and deceit, the amendment being based upon a tort. *Mitchell v. The Railroad*, 68 Ga. 644.

18. *Flint, etc., Ry. Co. v. Weir*, 37 Mich. 111.

Case and not *assumpsit* is the appropriate form of action where goods have been lost or damaged while in the carrier's freight house. *Welch v. The Railroad*, 68 N. H. 206, 44 Atl. Rep. 304.

III. THE PLEADINGS.

Sec. 1333. (§ 749.) Important to determine if plaintiff's declaration be in case or assumpsit.—There can, of course, be no fixed or certain rule under the various codes of practice which have been adopted as substitutes for the common-law mode of pleading, by which to ascertain, when the plaintiff has his election to sue either for breach of duty or upon the contract, whether his action is upon the one or the other. It is, nevertheless, important in many cases that this should be determined, as the nature of the defense to be adopted by the defendant may depend upon it. If the action is upon the contract, that may in itself contain the only defense which he may desire to make. If, however, it be for the neglect of duty, it may be important to him to rely upon some stipulation in his contract which it would then be necessary for him to set up in his answer or plea. As at common law, the mere mention of the word “undertake,” “promise,” or the like, would not be sufficient to indicate an intention to rely upon the contract. These words, as we have seen, do not necessarily refer to or imply, in pleading, a contract. If, however, the contract should be distinctly set out, and its description should be accompanied by its profert or exhibit, as is required by many, perhaps by all, of such codes, when the contract is sued upon, it would be conclusive that the party had elected to rely upon it instead of upon the failure in the performance of the legal duty.

Sec. 1334. (§ 750.) What the declaration must allege.—The declaration must correctly state the particular duty assumed by the carrier from which his liability is claimed to result, and on which the action is founded; and even when the action proceeds upon the neglect of duty, and not upon the contract, a material variance between the proof and the statements as to the particulars of the undertaking may be fatal.¹ The plaintiff

1. 2 Greenl. Ev. § 208; Steph. East, 89; Ireland v. Johnson, 1 (N. S.) 992; Max v. Roberts, 12 Bing. N. C. 162. For forms of

may rely upon a more general statement when he elects to proceed *ex delicto*, than when he sues upon the contract, but still if he enters into a particular or detailed statement of his cause of action, and there be a misdescription as to any matter which goes to the essence of the action, he must fail; as, for instance, if the allegation should be of an undertaking to carry one thing, or to one place, and the proof should be of an undertaking to carry another and a different thing, or to a

the declaration, both in *assumpsit* and in case, see 2 Chitty on Pl. 98-110, 486-493; 2 Greenl. on Ev. § 210.

Where a petition alleged that the plaintiff shipped a carload of ear-corn over defendant's road, and that this corn was carefully selected for its peculiar value as seed corn, in an action to recover special damages for its injury while in defendant's possession, it was held not to be necessary to allege that the plaintiff had, before shipment, notified the defendant that the corn was selected for seed purposes in order to prove such notice. Missouri, etc., Ry. v. Nevin, 31 Kan. 385. Other cases, however, hold such an allegation to be essential. See *post*, § 1367, 1369 and note.

In Pennsylvania Co. v. Poor, 103 Ind. 553, the complaint of the consignor against the common carrier was held bad in the absence of an averment of ownership. The presumption being that the consignee had the right of action, it was held that if the property was in the consignor that fact should have been averred.

In the following cases the declarations were held sufficient: Carlisle v. Keokuk, etc., Co., 82 Mo. 40; Central, etc., R. R. v.

Morris, 68 Tex. 49; Armstrong v. The Railway, 45 Minn. 85, 47 N. W. Rep. 459; Missouri, etc., Railway v. Edwards, 78 Tex. 307, 14 S. W. Rep. 607; New York, etc., Railway v. Gallaher, 79 Tex. 685, 15 S. W. Rep. 694; Gulf, etc., Railway v. Wilhelm (Tex.), 16 S. W. Rep. 109; Martin v. McLaughlin, 5 Col. 387; McFadden v. The Railway, 92 Mo. 343; Independence Mills Co. v. Railway, 72 Iowa, 535; Williams v. The Railroad, 9 W. Va. 33; Lang v. Brady, 73 Conn. 707, 49 Atl. Rep. 199; Smith v. The Railway, 92 Minn. 11, 99 N. W. Rep. 47.

In the following cases the declarations were held insufficient: Richardson v. The Railway, 61 Wis. 596; De Barry, etc., Line v. Railway, 40 Fed. Rep. 392 (bill for injunction); Cox v. Railway, 91 Ala. 392, 8 S. Rep. 824; Illinois, etc., Railroad v. Beard, 24 Ill. App. 322; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. Rep. 586; Anniston, etc., Railroad v. Ledbetter, 92 Ala. 326, 9 S. Rep. 73; Ausk v. The Railway, 10 N. Dak. 215, 86 N. W. Rep. 719, citing Hutchinson on Carr.; Railroad Co. v. Berry, 31 Ind. App. 556, 68 N. E. Rep. 702; Thomas v. The Railroad, 3 Pennewill, 81, 50 Atl. Rep. 285.

different place. The allegation, however, may be of an undertaking to carry two or any number of things, and if the proof show an undertaking to carry one of them, it will support the plaintiff's case, because the undertaking, though appearing from the statements of the declaration to be entire, is yet divisible, and the plaintiff may therefore recover for as much as he proves.

Sec. 1335. (§ 751.) When action is on the contract it must be set out correctly.—But when the action is upon the contract, if the contract is described as entire, and if there be even a trivial variation in the proof of it from the description, as, for instance, if the undertaking alleged be to carry two things, and the proof shows a contract to carry only one, the plaintiff must fail, because it is not the contract which the declaration describes, and therefore a recovery upon it would be no protection to the defendant from another action upon the actual agreement. For this reason, the action upon a contract is always entire in its nature, and must be proven exactly as laid in the declaration.² But it need not be set out *in haec verba*, but only according to its legal effect.

Sec. 1336. (§ 752.) Same subject—Example of particularity requisite in declaring on contract.—A notable instance of the particularity required in this regard is afforded by the case of *Weed v. The Railroad*.³ in which the authorities are fully stated by Cowen. J. The declaration was upon the contract to carry the plaintiffs' trunk, and money which was contained in it. It turned out, upon the proof, that the trunk did not belong to the plaintiffs, though the money did. "The proof," said the learned judge, "is, at most, of a contract with the plaintiffs to carry the money only. The declaration, then, fails in describing correctly a special executory contract, wherein great exactness is always demanded. Where the declaration is on a promise to do several things, and only one is

2. 1 Chitty on Pl. 312 *et seq.*; 647; *Stone v. Knowlton*, 3 Wend. King v. Pippett, 1 T. R. 235; 374.

Hughes v. The Railway, 14 Com. 3. 19 Wend. 534.

B. 637; *Slim The Railway*, *id.*

proved, this is a variance." But the plaintiffs were allowed to amend, so as to show a contract to carry the money only, as the misdescription amounted only to a trivial variance in point of form.⁴

Sec. 1337. (§ 753.) Same subject—Variance between declaration and proof, fatal.—So if the declaration in *assumpsit* upon the contract state it to be absolute, when the proof shows it to have been in the alternative, the plaintiff cannot recover, notwithstanding the party who, under the agreement, was to have the option of deciding, may have determined his option; for the mode of executing the contract could not change the original contract itself.⁵ And where it appears by the terms of a contract, for the breach of which the action is brought, that it was at the option of the defendant to deliver this or that quantity of goods at one time, and the remainder at another, it should be so stated.⁶ And where the contract was in the alternative, to transport fifteen or twenty tons of marble from one place to another, it was held that it must be stated in the declaration according to its terms; and if it be stated as an absolute contract for the transportation of twenty tons, and not fifteen or twenty tons, the variance is fatal. So if the declaration alleges a contract to deliver, in the alternative, to the plaintiff, or to another who is claimed to be the plaintiff's agent, but who is not alleged to be such agent in the declaration, and the proof shows a contract to deliver to the alleged agent only, it is a fatal variance.⁷ And where it was averred that a contract for the transportation of a corpse was made with the plaintiff, and the proof disclosed that it was made with another to whom the plaintiff had furnished the money for

4. In *Pennsylvania Co. v. Holderman*, 69 Ind. 18, it was held that where one paragraph of a complaint counts upon a written contract, and neither the original nor a copy thereof is attached to or fully and specifically set up therein, such omission is not cured by the fact that a copy of the

contract is attached to another paragraph of the complaint.

5. *Chitty on Pl.* 316 *et seq.*

6. *Penny v. Porter*, 2 East, 2; *Yate v. Willan*, *id.* 128.

7. *Atlanta, etc. R. R. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. Rep. 600.

charges, it was held that in the absence of a showing that the carrier had knowledge of the agency, the proof was not sufficient to establish the averment.⁸

Sec. 1338. (§ 754.) Same subject—Whole contract must be stated.—So if the plaintiff sue upon the contract, he must state the whole of it. If, for instance, there are embodied in it limitations of the liability of the carrier, they must be stated.⁹ As where, in the contract with the carrier, it was agreed that he should not be held liable for losses occasioned by fire or robbery, it was held to be a fatal variance not to state that part of the contract, and upon its so appearing, the plaintiff was nonsuited.¹⁰ If a part of the contract be that in certain events or for certain losses the carrier shall not be responsible, and the declaration fails to allege that his liability was thus qualified, it is evident that the true contract is not stated, and that there could be no recovery. This would be making the carrier liable upon a certain contract which in fact he had never made. Where the contract with a railway company was to carry certain horses for the plaintiff, he taking all the risks of the conveyance, and the declaration was upon a contract safely and securely to carry the horses, without reference to the risk taken upon himself by the plaintiff, it was held that the allegation was of a duty which did not arise upon the contract as it appeared in the evidence, and that the defendant was therefore entitled to a new trial.¹¹ And in an action of *assumpsit* against the carrier, upon a contract which excepted the dangers of navigation from the risks assumed by him, the declaration, in describing the contract, having omitted this exception, it was held that there was a variance between the contract as proved and the declaration, which, without an amendment of

8. *Lucas v. The Railway*, 122 Ala. 529, 25 So. Rep. 219.

9. *Baxter v. The Railway*, 165 Ill. 78, 45 N. E. Rep. 1003, citing *Hutchinson on Carr.*

10. *Latham v. Rutley*, 2 Barn. & C. 20.

11. *Shaw v. The Railway*, 13 Q. B. 347. And see, to the same ef-

fect, *White v. The Railway*, 2 Com. B. (N. S.) 7; *s. c.* 40 Eng. L. & E. 255; *Austin v. The Railway*, 16 Q. B. 600; *s. c.* 5 Eng. L. & Eq. 329; *The York, etc. Railway v. Crisp*, 14 Com. B. 527; *Simons v. The Railway*, 2 Com. B. (N. S.) 620.

the latter in the matter of the description, would be fatal to the plaintiff's action.¹²

Sec. 1339. (§ 755.) Reasons for requiring particularity in declaring.—The reasons for requiring certainty and particularity of the plaintiff in declaring upon his cause of action, whether upon a contract or for a breach of duty, but especially when he sets up a contract between himself and the defendant, the breach of which he alleges, are evident. They apply not only when the carrier is sued, but in all actions where one person seeks redress from another for an injury which he alleges he has sustained by a violation of his contract or of his duty. It is not requiring too much of one who seeks redress for a wrong to state with precision in what that wrong consists, in order that the other party, from whom redress is sought, may be apprised with certainty of the ground of the complaint, and, if made liable, may have upon record the exact evidence of the default for which he has accounted, so that he may not be twice vexed for the same thing.¹³ A practice which should dispense with any of the certainty required at common law in declarations of this character would be, so far, imperfect. We may therefore assume that, while the mere technical forms of actions are abolished, it is no less necessary than formerly to set out the undertaking or the contract, in actions against the carrier, with particularity and certainty. But it must at the same time be observed that a variance between the allegations of the declaration and the proof, in consequence of the far more liberal allowance of amendments than formerly, is attended with much less serious results to the plaintiff.

Sec. 1340. (§ 756.) Mere collateral stipulations need not be stated.—But a mere collateral provision, distinct from that portion of the contract which qualifies the liability of the carrier, and which contains "the entire consideration for the act, and the entire act which is to be done," need not be stated;

12. *Fairchild v. Slocum*, 19 St. 533; *Camp v. The Steamboat Wend.* 329; *s. c.* 7 Hill, 292; *Company*, 43 Conn. 333.

Stump v. Hutchinson, 11 Penn. 13. *Railroad Co. v. Cody*, 119 Ga. 371, 46 S. E. Rep. 429.

as, for instance, a provision which respects only the manner in which the damages shall be liquidated, after the right to them has accrued by a breach of the contract; or a notice that the carrier was not to be liable beyond a certain amount unless the goods were entered and paid for as being above that value. A provision of the former kind would be merely collateral to the main contract, which would be to carry the goods, and the former would be no part of the express contract to carry, although it might have the effect of a contract in estopping the owner of the goods from claiming a greater sum.¹⁴ And such words would be a condition in the contract that, unless demand or claim were made for the loss within a certain time after its occurrence, or after the date of the shipment, the liability of the carrier should cease.¹⁵

Sec. 1341. (§ 756a.) Pleadings in action for statutory penalty for excessive charge.—Many of the states have statutes regulating and defining the carrier's charges for freight, and providing a penalty for their violation. No satisfactory rule as to the mode of pleading under these various statutes can be given here. Yet it may be said generally, that where a plaintiff wishes to avail himself of the provisions of a public act, he is usually required, in the absence of any statutory provision to the contrary, not only to state such facts as bring his case clearly within the statute, but he must not omit or misstate any element of liability. He should also aver the obligation to have arisen under a statute, and should make express reference to it, by apt terms, to show the source of right relied on.¹⁶

14. *Clarke v. Gray*, 6 East, 564.

15. See *Baxter v. The Railroad*, 165 Ill. 78, 45 N. E. Rep. 1003, citing this section.

But if a valid and reasonable collateral provision (not alleged to be void by reason of public policy or statutory provision) be stated, such as a condition in the contract that, unless demand or claim is made for the loss of goods within a specified time after

such loss has occurred the liability of the carrier shall cease, and there is no allegation in the complaint or declaration of performance by the plaintiff of such collateral condition, the complaint will be demurrable. *Railway Co. v. Widman*, 10 Ind. App. 92, 37 N. E. Rep. 554.

16. *Howser v. Melcher*, 40 Mich. 185.

And it would be wise not only to refer generally to the whole statute, but also specifically to the section for a violation of which the action is brought.¹⁷ An illustration of the particularity required is the case of *Sorrell v. The Railroad*.¹⁸ This was an action to recover for an excessive freight charge, and it was alleged in the declaration that the carrier had charged unreasonable and extortionate rates of freight, giving the amount of the excess over the "reasonable rates." The Georgia code required the railroad commissioners in that state to make a schedule of "reasonable rates" for each road in the state, and made this schedule admissible as evidence in its courts. The declaration was held insufficient because it did not contain the allegation that the rate complained of was greater than that fixed by the commissioners as a reasonable rate.¹⁹

Sec. 1342. (§ 756b.) How common-law action for excessive charge is affected by statutory action.—It has been held that the common-law remedy of a shipper to recover from a carrier any sum paid for carriage, in excess of what would have been a reasonable charge, is not suspended by the enactment of a statute imposing penalties for excessive charges, or making the agent of the carrier exacting such charges guilty of a mis-

17. *Benalleck v. People*, 31 Mich. 200.

18. 75 Ga. 509.

19. In *Reynolds v. The Railroad*, 85 Mo. 90, an action to recover the statutory penalty for an overcharge, a petition was held sufficient, notwithstanding the fact that it alleged the maximum legal rate to be greater than it really was. Here the petition alleged facts sufficient to bring the case clearly within the sections of the statute, but referred to only one of these sections by number. It was also held in this case that notwithstanding the fact that the shipments were made under a

special contract fixing the charges at the legal rate, the plaintiff was not remitted to an action for a breach of the contract. Otherwise a statute, designed to protect shippers from overcharges, would be defeated.

In *Burkholder v. Union Trust Co.*, 82 Mo. 572, a complaint to recover for excessive charges upon two carloads of saw-logs, under the Missouri statute fixing the legal freight rate upon "heavy articles . . . in carloads," was held sufficient, without alleging that saw-logs were heavy articles, the court taking judicial notice of that fact.

demeanor.²⁰ This would not be true, of course, where the common-law remedy was expressly repealed. Nor in a state where the statutory action and remedy repealed the common-law action by implication.²¹ But the right to recover for excessive charges, by virtue of a statute, is lost by the repeal of that statute, unless there be a saving clause preserving the right of action; and this is true, notwithstanding the fact that the action had been commenced prior to, and was pending at, the time of the repeal. Such repeal, however, will not prevent the plaintiff from amending his declaration and recovering the amount of the excess, in tort, as at common law.²²

Sec. 1343. (§ 756c.) What is sufficient averment of an over-charge at common law.—In a common-law action for the recovery of the excess of an over-charge in a state having a statute fixing the maximum charges which may be made by a carrier of freight, it is only necessary to show that the charge made was in excess of the charge fixed by statute. Any charge in excess of this is conclusively an unreasonable one.²³ But a declaration, based upon the common-law duty of the carrier, averring that the carrier charged plaintiff the same freight for a short distance as it charged others for a greater distance, without averring that the discrimination was unjust or the charge extortionate, has been held insufficient.²⁴

Sec. 1344. (§ 757.) Statement as to the carrier's reward or compensation.—It is not necessary that a price should be paid to the carrier in order to give rise to his liability for the safety of the goods, or that any such price should be agreed upon. It is sufficient that he has accepted them. This is the beginning of his liability as a common carrier, unless he demands his com-

20. *Heiserman v. The Railway*, 63 Iowa, 732; *Smith v. The Railway*, 49 Wis. 443; *Graham v. The Railway*, *id.* 532, and s. c. 53 Wis. 473; *Hall v. The Railroad*, 44 W. Va. 36, 28 S. E. Rep. 754, 67 Am. St. Rep. 757, 41 L. R. A. 669; *Fuller v. The Railroad*, 31 Iowa, 187.

21. *Young v. The Railway*, 33 Mo. App. 509.

22. *Smith v. The Railway*, *supra*; *Graham v. The Railway*, *supra*.

23. *Heiserman v. The Railway*, 63 Iowa, 732.

24. *Illinois, etc. R. Co. v. Beard*, 24 Ill. App. 322.

pensation in advance and it be refused. If he makes no such demand, and accepts the goods without any agreement as to compensation, he will have the right to demand of the owner as much for his services as they are reasonably worth, and this right will be a sufficient consideration for the service. In declaring against him, therefore, for the loss of the goods, it is unnecessary to aver a consideration, though it is usual to allege in the declaration that he accepted them to be carried for a certain reward, or for a reasonable reward, without specifying what it was ²⁵ And where the action is for a refusal to accept the goods for carriage, it is only necessary, as we have seen, to allege that the plaintiff was ready and willing to pay such a sum as the carrier was lawfully entitled to receive for his acceptance and carriage of the goods, without alleging a tender. "Such a tender," said Parke, Baron, in *Pickford v. The Railway*,²⁶ "we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods and the payment of a reasonable sum for their carriage, being contemporaneous acts; the carrier being bound to receive the goods on the money being paid or tendered, and the bailor to pay the reasonable amount demanded, on the carrier's taking charge of the goods. The case of *Rawson v. Johnson*,²⁷ clearly shows that whenever a duty is cast on a party, in consequence of a contemporaneous act of payment to be done by another, it is sufficient if the latter pay or be ready to pay the money when the other is ready to undertake the duty. Here the acts to be done by the plaintiffs and defendants are altogether contemporaneous. The money is not required to be paid down by the plaintiffs until the carrier receives the goods which he is bound to carry."²⁸

25. *Hall v. Cheney*, 36 N. H. 26;

Taylor v. Wells, 2 Saund. 74, 2 Chitty on Pl. 100, n.; *Dalston v. Janson*, 1 Ld. Raym. 58; *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. Rep. 965.

26. 8 M. & W. 372.

27. 1 East, 203.

28. And where the refusal to carry is not on account of the non-payment of freight, it has been held unnecessary to allege a tender. *Central, etc. R. R. v. Morris*, 68 Tex. 49.

Sec. 1345. (§ 758.) The carrier's defense to the action.—

The carrier, when sued for the loss of the goods or damage done to them while in his custody, must, of course, when the manner of his defense is not regulated by statute, plead according to the rules of the common law; and there is nothing in the nature of the action against him, whether in case or upon the contract, which requires in his case any exception to the rules of pleading formerly universal wherever the common law prevailed. The first question, therefore, when the defense is to be made according to these rules, is to determine whether the action against him is in tort for breach of duty, or in *assumpsit* for breach of his contract. If the former, all that will be generally required will be a plea of the general issue of not guilty, under which the carrier may avail himself of almost all matters of defense; and it has, therefore, been thought that it is seldom advisable to resort to a special plea. So when the action against him is in the form of *assumpsit* for breach of his alleged contract, the general issue of *non-assumpsit* will in general be sufficient to put the burden of proving the contract, as well as its breach, upon the plaintiff. It can, therefore, but seldom become necessary, in either form of action, to do more than plead thus generally. This mode of pleading has, however, it is believed, with the distinction between the forms of actions, been generally abolished; and the carrier, when sued, will, like other defendants, be required, according to the substituted rules of pleading, to answer somewhat more minutely and specially, and set forth with some particularity and detail the ground upon which he proposes to rest his defense, so that the plaintiff may be informed of its nature. These substituted rules adopted by the numerous codes of practice, as they are called, apply to the carrier in common with others, and it would be vain to attempt a statement of any rule or principle which could have any general application or utility; and all that can be said is that the forms and modes of proceeding prescribed by the local law must be followed, in order to arrive at the issues of fact upon which the carrier's liability may depend.

IV. THE EVIDENCE.

Sec. 1346. (§ 759.) What must be proved by the plaintiff.—

In actions against the carrier for damages sustained by the owner of the goods by reason of the carrier's default, whereby a loss or an injury has happened to them, whether the action be based upon the breach of duty or upon the contract, it will be necessary for the plaintiff to show a delivery of the goods to him, an undertaking or contract on his part, either express or implied, to transport them as alleged, and the failure to perform the contract or his duty according to his undertaking.¹

Sec. 1347. (§ 760.) Plaintiff must show whose negligence caused loss.—What is necessary to constitute a delivery to the carrier, so as to fix upon him the obligation to carry the goods, and the responsibility for their safe custody, has already been shown,² and nothing remains to be added upon that subject, further than that the plaintiff, in order to entitle himself to a recovery in an action against the carrier, must not leave it doubtful whether the delivery has been made to him, or whether, at the time when the default occurred from which the injury resulted, the goods were in the possession of the carrier, or of some one for whose acts in respect to them he is responsible; for if, upon the proof, it be left doubtful in whose custody the goods rightfully were at the time the loss occurred, and upon whom, therefore, the responsibility should rest, there can be no recovery. As, for instance, in the case of successive lines of carriers, over all of which the goods must pass in order to reach destination, it would not be enough to show that the goods had never reached such destination, and must therefore have been lost or stolen somewhere upon the route; but, unless the first carrier by express or implied contract has assumed

1. Where, however, the carrier, or not there was a delivery to in its plea, confines itself to a the carrier, and non-delivery to general denial that it ever received the goods, and the plaintiff proves a delivery, it has been the consignee need not be proved. *Hot Springs Railroad v. Hudgins*, 42 Ark. 485.

2. *Ante*, ch. IV.

responsibility for the whole journey, the carrier by whose negligence or omission of duty the loss has occurred must be singled out, and the responsibility must be fixed upon him by the proof.³ Nor, in such a case, could the difficulty in fixing the responsibility where it properly belonged be obviated by suing all the carriers jointly, over whose lines it was necessary for the goods to pass. For unless it could be shown with which of them the fault lay, none of them could be held liable without proof of a partnership, or of some such association as would make them jointly and severally liable for each others' defaults. And the inconvenience to the owner of the goods, resulting from this rule, is, as we have seen,⁴ the principal argument in favor of what is known as the doctrine of Muschamp's case, and shows the importance to the shipper of a through contract with the first carrier upon the route, where that rule does not prevail.⁵

Sec. 1348. (§ 761.) Presumption that each of several connecting carriers received goods in same condition as when delivered to first carrier—Burden of proof to show contrary.—But a connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them.⁶ The

3. *Midland Railway v. Bromley*, 17 Com. B. 372; *s. c.* 33 Eng. L. & Eq. 235; *Gilbart v. Dale*, 5 Ad. & El. 543; *Anchor Line v. Dater*, 68 Ill. 369; *Boston, etc. Railroad v. Ordway*, 140 Mass. 510.

In the absence of a joint contract of shipment by which several connecting carriers are bound, or of a partnership between them, or of proof that the final carrier ratified the shipping contract made between the shipper and the initial carrier, such final

carrier will not be liable for goods which have been lost in transit unless the shipper can show that they came into its possession. *Texas, etc. R. Co. v. Berry*, 31 Tex. Civ. App. 3, 71 S. W. Rep. 326.

4. *Ante*, ch. IV.

5. *Chicago, etc. Ry. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Anchor Line v. Dater*, *supra*.

6. *Railway Co. v. Coolidge*, — Ark. —, 83 S. W. Rep. 333, 67 L. R. A. 555, citing *Hutchinson*

condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing

on Carr.; *Railway Co. v. Birdwell*, 72 Ark. 667, 82 S. W. Rep. 835; *Railroad Co. v. Hepner*, 3 Colo. App. 313, 33 Pac. Rep. 72, citing *Hutchinson on Carr.*; *Susong v. The Railroad*, 115 Ga. 361, 41 S. E. Rep. 566; *Central, etc. R. Co. v. Boyer*, 91 Ga. 115, 16 S. E. Rep. 953; *Ohio, etc. R. Co. v. Goldman*, 46 Ill. App. 625; *Railway Co. v. Jones*, 1 Ind. Terr., 354, 37 S. W. Rep. 208, citing *Hutchinson on Carr.*; *Railway Co. v. Miles*, 13 Ky. Law Rep. 539; *Bullock v. Dispatch Co.*, 187 Mass. 91, 72 N. E. Rep. 256; *Cote v. The Railroad*, 182 Mass. 290, 65 N. E. Rep. 400, 94 Am. St. Rep. 656; *Moore v. The Railroad*, 173 Mass. 335, 53 N. E. Rep. 816; *Paterson v. The Railway*, — Minn. —, 103 N. W. Rep. 621; *Faison v. The Railway*, 69 Miss. 569, 13 So. Rep. 37, 30 Am. St. Rep. 577; *Flynn v. The Railway*, 43 Mo. App. 424; *Strong v. The Railroad*, 86 N. Y. Supp. 911, 91 App. Div. 442; *Fasy v. Navigation Co.*, 79 N. Y. Supp. 1103, 77 App. Div. 469; *s. c.* 177 N. Y. 591, 70 N. E. Rep. 1098; *Fox v. The Railway*, 38 N. Y. Supp. 88, 16 Misc. 370; *Myerson v. Woolverton*, 29 N. Y. Supp. 737, 9 Misc. 186; *Gwyn Harper Mfg. Co. v. The Railroad*, 128 N. Car. 280, 38 N. E. Rep. 894, 83 Am. St. Rep. 675; *Railroad Co. v. Naive*, 112 Tenn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443; *Railroad Co. v. Brewing Co.*, 96 Tenn. (12 Pickle) 677, 36 S. W. Rep. 392, citing *Hutchinson on Carr.*; *Rail-*

way Co. v. Cushney, 95 Tex. 309, 67 S. W. Rep. 77; *Railroad Co. v. Edloff*, 89 Tex. 454, 34 S. W. Rep. 414; *s. c.* 35 S. W. Rep. 144; *Missouri, etc. R'y Co. v. Clayton*, (Tex. Civ. App.) 84 S. W. Rep. 1069; *Texas, etc. R'y Co. v. Capper*, (Tex. Civ. App.) 84 S. W. Rep. 694; *Bibb v. The Railway*, (Tex. Civ. App.) 84 S. W. Rep. 663, citing *Hutchinson on Carr.*; *Railway Co. v. Pitts*, (Tex. Civ. App.) 83 S. W. Rep. 727; *Railroad Co. v. Diamond Roller Mills*, (Tex. Civ. App.) 82 S. W. Rep. 660; *Railway Co. v. Shanley*, (Tex. Civ. App.) 81 S. W. Rep. 1014; *Railway Co. v. Mazzie*, 29 Tex. Civ. App. 295, 68 S. W. Rep. 56; *Houston, etc. R. Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43; *Railway Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. Rep. 801, citing *Hutchinson on Carr.*; *Densmore Commission Co. v. The Railway*, 101 Wis. 563, 77 N. W. Rep. 904; *Walter v. Railroad Co.*, — Ala. —, 39 So. Rep. 87; *Kansas City, etc. R'y Co. v. Embrey*, — Ark. —, 90 S. W. Rep. 15; *Powers v. Railway Co.*, — Iowa, —, 105 N. W. Rep. 345; *Modern Match Co. v. Railroad Co.*, — Mich. —, 104 N. W. Rep. 19; *Jones v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 158; *Berkowitz v. Railway Co.*, 96 N. Y. Supp. 825, 109 App. Div. 878; *St. Louis, etc. R'y Co. v. Byers Bros.*, — Tex. Civ. App. —, 90 S. W. Rep. 720.

The same rule applies where a part of the shipment is lost, the

the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession.⁷ Nor will the fact that the goods were concealed in boxes or packages relieve the final carrier, if he will escape liability, from showing that they were received by him in the condition in which he delivered them at destination.⁸ And the presumption which applies to the last of a line of connecting carriers, that the goods were delivered to it in the same condition as they were delivered to the first carrier, applies also to any intermediate carrier in whose possession the goods have

remainder being delivered, because such loss is in the nature of damage to the shipment. *Gwyn Harper Mfg. Co. v. The Railroad*, 128 N. Car. 280, 38 N. E. Rep. 894, 83 Am. St. Rep. 675; *Faison v. The Railway*, 69 Miss. 569, 13 So. Rep. 37, 30 Am. St. Rep. 577; *Railway Co. v. Birdwell*, 72 Ark. 667, 82 S. W. Rep. 835; *Jones v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 158.

Evidence to exonerate the carrier is admissible. Thus in *Burwell v. Railroad Co.*, 94 N. C., at page 455, it is said: "It seems to us too plain to admit of serious question that the defendant had the right to offer any competent evidence on the trial going to show that the property in question was not damaged while on its line of road and in its care and custody. The receipt and manifest were evidence going to prove a *prima facie* case of liability against it, but they were not conclusive. It was competent to disprove the case so made."

7. *Laughlin v. The Railway*, 28 Wis. 204; *Dixon v. The Railroad*, 74 N. C. 538; *Smith v. The Railroad*, 43 Barb. 225; *Brintnall v. The Railroad*, 32 Vt. 665; *Schriv*

v. The Railroad, 24 Minn. 506; *Mobile, etc. Railroad v. Tupelo, etc. Co.*, 67 Miss. 35, 7 South. Rep. 279; *Savannah, etc. Railway v. Harris*, 26 Fla. 148, 7 South. Rep. 544.

Where it appears that the goods were damaged subsequent to the shipment, and the evidence fails to show upon what line of a series of connecting carriers they were damaged, the presumption is that the damage was caused by the fault of the last carrier. *Texas, etc. Railway Co. v. Adams*, (Tex. Civ. App.) 14 S. W. Rep. 666. But when there is no evidence to show that the goods were delivered to the carrier, or some connecting line, in good condition, it is presumed that they were delivered to the consignee in the same condition in which they were received by the carrier for shipment. *Missouri, etc. Railway v. Breeding*, (Tex.) 16 S. W. Rep. 184.

8. *Morganton Mfg. Co. v. The Railway*, 121 N. Car. 474, 28 S. E. Rep. 474, 61 Am. St. Rep. 679; *Beede v. The Railway Co.*, 90 Minn. 36, 94 N. W. 454, 101 Am. St. Rep. 390, where the goods were shipped in through sealed cars.

been found in a damaged condition.⁹ In such cases the receiving carrier will be regarded as the agent of the succeeding connecting carriers for the purpose of accepting the goods for transportation over the connecting lines, and the receipt or bill of lading given by such receiving carrier will be competent evidence in an action against any of the succeeding carriers into whose possession the goods may have come, to show the delivery for transportation, the condition of the goods at the time of such delivery, and the terms of the shipment.¹⁰ And while it has been held that, if an action be brought against the first or any intermediate carrier, it will be sufficient to establish a *prima facie* liability to show a delivery of the goods in good condition to the first carrier and their delivery at destination in a damaged condition, and that the carrier who is sued, if he will escape liability, must show that they were delivered to the next succeeding carrier in as good condition as they were in when he received them,¹¹ the rule sustained by the weight of authority is that no presumption will arise from the mere showing that the goods were delivered at destination in a damaged condition that the damage occurred on the line of the first or of any intermediate carrier, and that the burden of proof will be upon the plaintiff to show that the damage occurred while the goods were in the possession of the carrier against whom the suit has been brought.¹² Where, however, the suit is brought against the first or any intermediate carrier, and it is shown that the carrier who is sued was guilty of negligence which contributed to the injury, he will be liable although the final carrier may also have been guilty of negligence which contributed in a greater degree to the injury.¹³

9. Savannah, etc. R'y Co. v. Harris, 26 Fla. 148, 7 So. Rep. 544, 23 L. R. A. 551; Railway Co. v. Culver, 75 Ala. 587.

10. Southern Express Co. v. Hess, 53 Ala. 19.

11. Meredith v. The Railway, 137 N. Car. 478, 50 S. E. Rep. 1, citing Britnall v. The Railroad, 32 Vt. 665.

12. Farmington Mercantile Co.

v. The Railway, 166 Mass. 154, 44 N. E. Rep. 131; Louisville, etc. R. Co. v. Jones, 100 Ala. 263, 14 So. Rep. 114; Crouch v. The Railroad, 42 Mo. App. 248; Strong v. The Railroad, 86 N. Y. Supp. 911, 91 App. Div. 442.

13. Railroad Co. v. Coolidge, — Ark. —, 83 S. W. Rep. 333, 67 L. R. A. 555.

Sec. 1349. Same subject—Rule in Michigan.—The supreme court of Michigan has, however, refused to follow the rule as stated in the preceding section and has held that where goods are transported by successive carriers, and an action is brought against the terminal carrier for damage to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent upon the plaintiff to show that they were in good order when received by the defendant.¹⁴ And this rule, it is said, is established for that state.¹⁵

Sec. 1350. (§ 762.) Contract with carrier may be either express or implied.—The contract with the carrier may be express or implied. If it be express, it should be proven, whether the action be in tort or *assumpsit*; and if it should appear to be a different contract or undertaking from that alleged by the plaintiff, the variance will be equally fatal in both actions, and without an amendment by the plaintiff of his declaration, so as to make its description of the undertaking correspond with that shown by the proof, he would necessarily fail in his action, because it would appear that the undertaking of the carrier, and the duty which sprang from it, were essentially different from those alleged by the plaintiff as the basis of his action.¹⁶ And from this necessity for the proof of an undertaking, either express or implied, although the action may be in form *ex delicto*, it is sometimes designated as an action *ex delicto quasi ex contractu*.¹⁷

But in an action against an initial carrier, the receipt of a connecting carrier reciting that the goods were received from the initial carrier in a damaged condition is not competent evidence. *Hirsch v. Railroad Co.*, 99 N. Y. Supp. 431.

14. *M. H. & O. R. R. Co. v. Langston*, 32 Mich. 251; *M. H. & O. R. R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. Rep. 209, 40 Am. Rep. 453.

15. *Rolfe v. Railway Co.*, — Mich. —, 107 N. W. Rep. 899.

16. A variance, however, between the proof and the allegation in the declaration as to quantity, especially if it be stated under a *videlicet*, will be immaterial. *Deming v. The Railroad*, 48 N. H. 455.

17. *Allen v. Sewall*, 2 Wend. 327; *Orange Bank v. Brown*, 3 *id.* 158; *Boson v. Sandford*, 2 Shower, 478.

Sec. 1351. (§ 763.) Express contract not necessary—Delivery and acceptance enough.—It is not necessary, however, that there should be an express contract with the common carrier. Proof of the delivery of the goods to him, with directions as to their carriage, and of his acceptance of them, would give rise to an undertaking on his part to carry them according to such directions. The duties and liabilities of the common carrier are fixed by law, and as soon as he accepts goods for carriage, an implied undertaking at once attaches to such acceptance to carry the goods safely and according to the directions of the bailor; and a corresponding obligation at the time arises on the part of such bailor to pay a reasonable compensation for the service.¹⁸ The law, however, will imply the contract only from the fact that the delivery has been made to one who is a common carrier,¹⁹ and no such implication will be made so as to fix a liability upon one who is a mere private carrier. As to him, an express contract must be shown.²⁰ The question, therefore, whether the carrier upon whom it is sought to impose a liability for the loss of the goods is a common carrier, will sometimes become of importance in the absence of an express contract, as one of evidence, and independently of the difference in the degree of liability which the law imposes.

Sec. 1352. (§ 764.) Plaintiff must produce some evidence of loss—What evidence will be sufficient.—Although the claim of the plaintiff in an action for the loss of the goods may rest upon negligence or nonfeasance and not upon a positive misfeasance, and would, therefore, seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss, notwithstanding its negative character; and if it be out of his power to show positively the loss of the goods, he

18. *Ante*, § 807.

Railroad Co. v. Gerson, 102 Ala. 409, 14 So. Rep. 873.

19. It should be averred in the declaration that the defendant is a common carrier. *Marshall v. The Railway*, 11 Com. B. 655; *Pozzi v. Shipton*, 8 Ad. & El. 963;

20. *Orange Bank v. Brown*, *supra*; *The Michigan, etc. R. R. v. McDonough*, 21 Mich. 165; 2 Greenl. on Ev. § 210.

must at least prove such circumstances as would create the inference against the defendant that they had been lost; as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them to whom they were consigned.²¹ That the goods were delivered to the common carrier or his agent, and that they have failed, after sufficient time for their carriage, to arrive at the destination for which they were intended, and to which, by his undertaking, he was to carry them, and have never been delivered by him to his employer or to the consignee, is *prima facie* evidence of such negligence or misconduct on the part of the carrier as will subject him to liability for their loss, without evidence on his part excusing the delay or showing that the goods have been lost by some of the causes for which he will be excused by the law or by the terms of his contract.²² So

21. *Tucker v. Cracklin*, 2 Stark. 385; *Griffiths v. Lee*, 1 Car. & P. 110; *Woodbury v. Frink*, 14 Ill. 279; 2 Greenl. on Ev. sec. 213.
22. *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Adams Ex. Co. v. Stettaners*, 61 *id.* 184; *American Ex. Co. v. Sands*, 55 Penn. St. 140; *Davidson v. Graham*, 2 Ohio St. 131; *Whitesides v. Russell*, 8 Watts & S. 44; *Little v. The Railroad*, 66 Me. 239; *The Live Yankee, Deady*, 420; *Hunt v. The Cleveland*, 6 McLean, 76; *McManus v. The Railway*, 4 H. & N. 327; 2 Greenl. on Ev. 219; *Story on Bail*. § 529; *Montgomery, etc. R. R. v. Moore*, 51 Ala. 394. See, also, *Chicago, etc. R'y v. Dickinson*, 74 Ill. 249; *Cooper v. Railway*, 92 Ala. 329, 9 South. Rep. 159; *Browning v. Transportation Co.*, 78 Wis. 391, 47 N. W. Rep. 428, 23 Am. St. Rep. 414, 10 L. R. A. 415; *Davis v. Jacksonville, etc. Line*, 126 Mo. 69, 28 S. W. Rep. 965; *Grier v. The Railway*, 108 Mo. App. 565, 84 S. W. Rep. 158; *George v. The Railway*, 57 Mo. App. 358; *Gulf, etc. Ry. Co. v. Roberts*, (Tex. Civ. App.) 85 S. W. Rep. 479; *Saleeby v. The Railroad*, 90 N. Y. Supp. 1042, 99 App. Div. 163; *Railway Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206; *Pennsylvania Co. v. Liveright*, 14 Ind. App. 518, 43 N. E. Rep. 162; *s. c.* 41 N. E. Rep. 350; *The Priscilla*, 106 Fed. 739; *The Lennox*, 90 Fed. 308; *Blum v. Monahan*, 73 N. Y. Supp. 162, 36 Misc. Rep. 179; *Everett v. Railroad Co.*, 138 N. Car. 68, 1 L. R. A. (N. S.) 985, 50 S. E. Rep. 557.
- Where three dogs were delivered to the carrier for transportation, and only two were delivered at destination, the presumption was held to arise that the carrier or some of his agents converted the dog, or by negligence allowed it

where it is proven that when the goods were delivered to the carrier they were in good order, and that when delivered at destination they were in a damaged condition, a *prima facie* presumption will arise that the damage was occasioned by some cause for which the carrier was responsible, and unless he can show that it was due to a cause for which by the law or his contract he would be excused, he will be liable.²³

Sec. 1353. (§ 765.) What the carrier may show.—In his defense the carrier may show that the loss or injury was occasioned by the act of God, the public enemy, or the public authority, or by fraud or fault of the owner of the goods, or that it resulted from an inherent defect or infirmity in the goods themselves which has caused their decay or destruction;²⁴ or he may show that by his contract with the shipper he was not to be held liable for loss or damage to the goods from certain causes or accidents, and that the loss or damage in the particular instance happened from one of the causes for which, by his contract, it was expressly agreed that he was not to be re-

to escape. *Express Co. v. Walker*, 26 Ky. Law Rep. 1025, 83 S. W. Rep. 106. *Hick v. The Railway Co.*, 51 Mo. App. 532; *The D. Harvey*, 139 Fed. 755.

23. *Bonfiglio v. The Railway*, 125 Mich. 476, 84 N. W. Rep. 772; *Railway Co. v. Radbourne*, 52 Ill. App. 203; *Rieser v. Express Co.*, 91 N. Y. Supp. 170, 45 Misc. 632; *Hutkoff v. The Railroad*, 61 N. Y. Supp. 254, 29 Misc. 770; *s. c.* 63 N. Y. Supp. 198, 30 Misc. 802; *Morris v. Wier*, 46 N. Y. Supp. 413, 20 Misc. 586; *Caldwell v. Transfer Co.*, 33 N. Y. Supp. 993, 13 Misc. 37; *Bowden v. Fargo*, 22 N. Y. Supp. 889; *The La Kroma*, 138 Fed. 936; *The Warren Adams*, 74 Fed. 413, 20 C. C. A. 486, 38 U. S. App. 356; *s. c.* 163 U. S. 679; *Hudson, etc. Lighterage Co. v. Wheeler, etc. Co.*, 93 Fed. 374; *The Mascotte*, 51 Fed. 605, 2 C. C. A. 399, 1 U. S. App. 251; *Degge v. The Express Co.*, 64 Mo. App. 102; But the plaintiff must first show in what condition the goods were when they were received by the carrier. *Jean, Garrison & Co. v. Flagg*, 90 N. Y. Supp. 289, 45 Misc. 421. He must also show that the damage occurred before they were delivered at destination. *Hirsch v. Hudson River Line*, 57 N. Y. Supp. 272, 26 Misc. 823, citing *Canfield v. The Railroad*, 75 N. Y. 144. Evidence that a trunk was broken while in the possession of the carrier will be sufficient to warrant an inference that goods which were lost from it were lost at the time of such breakage. *Railroad Co. v. Cohen*, 66 Ill. App. 318.

24. *Ante*, ch. VI.

sponsible; as, for instance, that his contract was that he was not to be held responsible for losses from fire or from the dangers of navigation. In such cases he may show in defense to the claim of the plaintiff that the goods were burned, or were destroyed or injured by an accident attributable to what are known as the dangers of navigation. But in all such cases the burden is, of course, upon the carrier, to establish the fact which will bring his case within the exception to the rule of liability which would otherwise apply.²⁵

Sec. 1354. (§ 766.) Rule that burden of proof is upon carrier to show no negligence.—But where he relies upon the fact that the loss has been caused by one of these excepted causes, will he be required to go further than the mere proof of that fact, and show that there was no negligence or want of due care on his part but for which the goods would not have been exposed to the danger? Upon this question the authorities are in conflict. Upon the one hand, it is said that when the carrier alleges and relies upon an exception to his liability by the ordinary rule of presumption against him, he must bring himself fully within such exception, not merely by showing that the goods were lost from a cause for which, either by the law or by the terms of his contract, he cannot be held responsible, but

25. *Ante*, § 449. See, also, *Empire State Cattle Co. v. Railway Co.*, 129 Fed. 480; *Kansas City, etc. R. Co. v. Heard*, — Miss. —, 39 So. Rep. 1011; *The Guy C. Goss*, 53 Fed. 826; *The Beeche Dene*, 55 Fed. 525, 5 C. C. A. 207, 2 U. S. App. 582; *Insurance Co. v. Transportation Co.*, 97 Fed. 653; *Argo S. S. Co. v. Seago*, 101 Fed. 999, 42 C. C. A. 128; *Doherr v. Houston*, 128 Fed. 594, 64 C. C. A. 102, *affirming* 123 Fed. 334; *The Patria*, 132 Fed. 971, 68 C. C. A. 397, *affirming* 125 Fed. 425; *Steamship Co. v. Burrows*, 36 Fla. 121, 18 So. Rep. 349; *Railway Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. Rep. 899; *Kalina & Cizek v. Railroad Co.*, 69 Kan. 172, 76 Pac. Rep. 438; *Louisville, etc., R. Co. v. Bourne & Embury*, 15 Ky. L. R. 445; *Bonfiglio v. Railway Co.*, 125 Mich. 476, 84 N. W. Rep. 772; *Parker v. Railway Co.*, 133 N. C. 335, 45 S. E. Rep. 658, 63 L. R. A. 827; *Mitchell v. Railroad Co.*, 124 N. C. 236, 32 S. E. Rep. 671, 44 L. R. A. 515; *Normile v. R. & Nav. Co.*, 41 Ore. 177, 69 Pac. Rep. 928; *Schaeffer v. Railroad Co.*, 168 Pa. St. 209, 31 Atl. Rep. 1088, 47 Am. St. Rep. 884; *Johnstone v. Railroad Co.*, 39 S. Car. 55, 17 S. E. Rep. 512.

by going further and showing that he exercised at least ordinary skill and care to avoid or escape from the calamity; and that it must appear that, notwithstanding such care and skill, it was unavoidable. In other words, it is said that the burden is upon the carrier, not merely to show that the goods perished or were damaged by the excepted accident or peril, but that he was free from any negligence contributory to it, and could not by the use of care and diligence have prevented it or its consequences, the very fact of the loss of the goods being *prima facie* evidence of negligence, the burden of rebutting which is cast upon the carrier. This is the rule in Alabama,¹ California,² Connecticut,³ Georgia,⁴ Kentucky,⁵ Minnesota,⁶ Mississippi,⁷ Nebraska,⁸ North Carolina,⁹ Ohio,¹⁰ South Carolina,¹¹

1. *Steele v. Townsend*, 37 Ala. 247; *Mobile, etc. Railroad v. Jarboe*, 41 *id.* 644; *South, etc. Railway v. Henlein*, 52 *id.* 606; *Grey's Ex'r v. Mobile Trade Co.*, 55 *id.* 387; *Alabama, etc. Railroad v. Little*, 71 *id.* 611; *Louisville, etc. Railroad v. Oden*, 80 *id.* 38. See *Western Railway v. Harwell*, 91 Ala. 340, 8 South. Rep. 649; *Mouton v. The Railroad*, 128 Ala. 537, 29 So. Rep. 602; *Railroad Co. v. Cowherd*, 120 Ala. 51, 23 So. Rep. 793; *Railroad Co. v. Gidley*, 119 Ala. 523, 24 So. Rep. 753; *McCarthy v. The Railroad*, 102 Ala. 193, 14 So. Rep. 370, 48 Am. St. Rep. 29, citing *Hutchinson on Carr.*; *Southern, etc. R'y Co. v. Levy*, — Ala. —, 39 So. Rep. 95; *Louisville, etc. R. Co. v. Smitha*, — Ala. —, 40 So. Rep. 117.

2. *Braunton & Robertson v. Southern Pac. Co.*, — Cal. App. —, 83 Pac. Rep. 265; *Wilson v. Railroad Co.*, 94 Cal. 166, 29 Pac. Rep. 861, 17 L. R. A. 685.

3. *Mears v. The Railroad*, 75 Conn. 171, 52 Atl. Rep. 610, 96 Am. St. Rep. 192, 56 L. R. A.

884; *Starper Bros. v. The Railroad*, 37 Conn. 272.

4. *Berry v. Cooper*, 28 Ga. 543; *Railway Co. v. Johnson King & Co.*, 121 Ga. 231, 48 S. E. Rep. 807.

5. *Louisville, etc. R. Co. v. Brown*, — Ky. —, 90 S. W. Rep. 567.

6. *Shriver v. The Railroad*, 24 Minn. 506; *Shea v. The Railway*, 63 Minn. 228, 65 N. W. Rep. 458; *Southard v. The Railway*, 60 Minn. 382, 62 N. W. Rep. 619; *Hinton v. The Railway*, 72 Minn. 339, 75 N. W. Rep. 373; *Lindsley v. The Railway*, 36 Minn. 539, 33 N. W. Rep. 1; *Hull v. The Railway*, 41 Minn. 510, 43 N. W. Rep. 391; *Boehl v. The Railway*, 44 Minn. 191, 46 N. W. Rep. 333. But see *Jones v. The Railroad*, 91 Minn. 229, 97 N. W. Rep. 893, 103 Am. St. Rep. 507.

7. *Chicago, etc. Railroad v. Moss*, 60 Miss. 1003; *Chicago, etc. Railroad v. Abels*, *id.* 1017. See, also, 2 Greenl. on Ev. sec. 219.

8. *Chicago, etc. R'y Co. v. Manning*, 23 Neb. 552; *Railroad Co. v. Lawler*, 40 Neb. 356, 58 N. W. Rep. 968.

9. *Mitchell v. The Railroad*, 124

Texas,¹² and West Virginia,¹³ and would seem to be the better rule and in accord with reason and public policy.¹⁴

N. Car. 236, 32 S. E. Rep. 671, 44 L. R. A. 515; *Parker v. The Railroad*, 133 N. Car. 335, 45 S. E. Rep. 658, 63 L. R. A. 827; *Hinkle v. The Railway*, 126 N. Car. 932, 36 S. E. Rep. 348, 78 Am. St. Rep. 685. But see *Smith v. The Railroad*, 64 N. Car. 235; *General Fire Extinguisher Co. v. The Railway*, 137 N. Car. 278, 49 S. E. Rep. 208.

10. *Graham v. Davis*, 4 Ohio St. 362; *Union Express Co. v. Graham*, 26 *id.* 595; *United States Express Co. v. Backman*, 28 *id.* 144; *Gaines v. Union Transportation Co.*, 28 *id.* 418.

11. *Johnstone v. The Railroad*, 39 S. Car. 55, 17 S. E. Rep. 512; *Swindler v. Hilliard*, 2 Rich. 286; *Baker v. Brinson*, 9 *id.* 201; *Slater v. The Railway*, 29 S. Car. 96.

12. *Ryan v. The Railway*, 65 Tex. 13; *Missouri, etc. Railway v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. Rep. 785; *Texas, etc. R'y Co. v. Richmond*, 94 Tex. 571, 63 S. W. Rep. 619; *Texas, etc. R'y Co. v. Dishman*, (Tex. Civ. App.) 85 S. W. Rep. 319; *Houst., etc. R'y Co. v. McFadden*, (Tex. Civ. App.) 40 S. W. Rep. 216; *Railroad Co. v. Efron*, (Tex. Civ. App.) 38 S. W. Rep. 639.

13. *Brown v. Adams Ex. Co.*, 15 W. Va. 812; *Bosley v. The Railroad*, 54 W. Va. 563, 46 S. E. Rep. 613, 66 L. R. A. 871.

14. In *Chicago, etc. R. Co. v. Moss*, 60 Miss. 1003, the court ably discusses the general question as to the burden of proof as follows:

"Where goods are received for transportation by a common carrier, under a special contract by which his common-law liability as

insurer is limited, it is held by a number of courts (in fact by a majority of them) that the carrier, having proved the loss to have occurred by reason of the excepted cause, it then devolved upon the shipper to establish the negligence of the carrier, failing in which he cannot recover. Such is the rule in the courts of the United States, of Pennsylvania, of New York, of Louisiana, Missouri, and probably of other states. *Clark v. Barnwell*, 12 How. 279; *Transportation Co. v. Downer*, 11 Wall. 129; *Patterson v. Clyde*, 67 Pa. St. 500; *Colton v. Railroad*, *id.* 211; *Lamb v. Railroad*, 46 N. Y. 271; *Cochran v. Dinsmore*, 49 N. Y. 249; *Steers v. Steamship Co.*, 57 N. Y. 1; *Read v. Railroad Co.*, 60 Mo. 199; *N. O. Ins. Co. v. Railroad Co.*, 20 La. Ann. 302, 24 La. Ann. 100.

"On the other hand it is said by Mr. Greenleaf, and it is held in a number of states, that under such contracts the burden is upon the carrier to show not only the loss by the excepted cause, but also that he himself was free from fault. 2 Greenl. on Ev., sec. 219; *Swindler v. Hilliard*, 2 Rich. 286; *Baker v. Brinson*, *id.* 201; *Graham v. Davis*, 4 Ohio St. 362; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Berry v. Cooper*, 28 Ga. 543; *Steele v. Townsend*, 37 Ala. 247; *Grey v. Mobile Co.*, 55 Ala. 387; *Brown v. Adams Express Co.*, 15 W. Va. 812.

"And such would seem to be the rule in Connecticut and Illinois. *Starper Bros. v. Railroad Co.*, 37 Conn. 272; *Dunspeth v. Wade*, 3

III. 285. The doctrine that the burden of proof under such circumstances is upon the plaintiff to establish negligence first found expression in the courts of the United States in the case of *Clark v. Barnwell*, which was decided by a divided court. The rule there announced has, however, been uniformly adhered to by the courts of the United States and has been adopted by those of many of the states.

"When first announced it was apparently based upon the proposition that by the contract the carrier ceased to be a common carrier and became a simple bailee for hire. In *Lamb v. Railroad Co.*, 46 N. Y. 271, Grover, J., in delivering the opinion of the majority of the court said: 'The defendant was exonerated from all liability as carrier for a loss by the destruction of the cotton by fire. Relieved of this responsibility it was liable only, in case it was destroyed, as bailee for hire.' In *York Co. v. Central Railroad*, 3 Wall. 107, Mr. Justice Field said: 'By the special agreement the carrier became, in reference to the particular transaction, an ordinary bailee and private carrier for hire.'

"But an ordinary bailee or private carrier may by special contract regulate the degree of diligence which shall be required of him. The next step, therefore, taken by common carriers was in the direction of contracting against their negligence or misfeasance as a private carrier might do. That they might do this necessarily and logically followed from the principles announced. But the courts took

alarm when they contemplated the results, and denied that a common carrier could by contract exempt himself from losses occurring from his own negligence. To do this it was necessary to decide that by such contract a common carrier could not divest himself of his character as such and become an ordinary bailee or private carrier for hire. In *Railroad Company v. Lockwood* the point was presented, and the court, in deciding the case, said: 'It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever because he is bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by reason of their occupation, not by virtue of the responsibilities under which they rest. . . . The theory occasionally announced that a special contract as to the terms and responsibilities of a common carrier changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of any ordinary bailee for hire, whilst the nature of his business renders him a common carrier still.' In support of this principle the court relies on the case of *Davis v. Graham*, 2 Ohio St.; *Graham v. Davis & Co.*, 4 Ohio St.; *Swindler v. Hilliard*, 2 Rich.;

Baker v. Brinson, 9 Rich., and *Steele v. Townsend*, 37 Ala., hereinafter cited, in each of which cases it was distinctly decided that a common carrier did not by reason of a special contract lose his character as such, and because he did not, that the burden remained on him of showing, in case of loss, not only that the loss occurred by reason of the excepted cause, but also that it happened without any fault on his part. As was said in these cases, the law which forbids a common carrier to contract for immunity against loss arising from his own negligence, practically inserts, as if written in the contract after each stipulation for exemption, the words: 'Provided such loss occurs without any negligence of the carrier or his agents.' Any loss, therefore, which occurs in any other manner than by the excepted cause, and without the fault of the carrier, is not within the terms of the contract. It is a familiar rule, both of pleading and evidence, that a half defense is no defense, and this, it would seem, would cast upon the common carrier the necessity to plead, and to sustain by proof all the facts necessary to his exoneration. If, on the contrary, the rule announced by the supreme court of the United States is to govern, and if, as was said in *Railroad Company v. Lockwood*, the common carrier does not by reason of the special contract become a mere bailee or private carrier, as it was said in *York v. Railroad Company* that he did, then the question arises, what degree of negligence is the shipper required to show? If the 'responsibility'

of the carrier is only that of a bailee or private carrier for hire, it would, it seems, be necessary for the shipper to show such negligence or want of care as would render liable a bailee or private carrier for hire; while, on the other hand, if the 'nature of his employment' (that of a common carrier) is the test of diligence and care required of him, then it would seem that the plaintiff should recover upon proof of an absence of that care and diligence which is required of a common carrier. In escaping from one difficulty we would thus encounter another equally perplexing. To us it also seems that public policy forbids a further relaxation of the principles of the common law governing common carriers. It is no uncommon thing in this age to see under one management a line of railroads extending from the lakes of the north to the Gulf of Mexico, or from the Atlantic to the Pacific ocean. To hold that a shipper in New York or Chicago shall be required to establish the negligence of the carrier by proof of the circumstances of a fire in California or New Orleans would, in a great number of cases, result in a verdict for the carrier, even though there was in fact negligence. In a large majority of cases the facts rest exclusively in the knowledge of the employees, whose names and places of residence are unknown to the shipper. In many cases the witnesses are the employees whose negligence has caused the loss, and if known to the shipper, it may be dangerous for him to rest his case upon their testimony, since the natural impulses of mankind

Sec. 1355. (§ 767.) Rule that burden of proof as to negligence is upon the shipper.—On the other hand it is said that when the carrier has shown that loss was occasioned by any of the causes, against liability for the consequences of which he is protected by law or by his contract, it will not be presumed that his negligence in any degree contributed to the loss, but that, on the contrary, negligence being in itself a positive wrong, the presumption, in the absence of proof to establish it, will be that the carrier has done his duty, and that consequently, when it has been shown that the loss resulted from any of such causes, under circumstances which do not show negligence, the burden of proving such negligence devolves upon the plaintiff.¹ This view of the question prevails in the English,² Arkansas,³ Indiana,⁴ Kansas,⁵ Louisiana,⁶ Maine,⁷ Mis-

would sway them in narrating the circumstances to palliate their fault by stating the occurrence in the most favorable light to themselves. All the authorities hold that it devolves upon the carrier to show the loss to have occurred by the excepted cause. In doing this it will add but little to his burden to show all the attending circumstances, and that the burden rests upon him to do so and disprove his own negligence, we think, arises from the terms of the contract, from the character of his occupation, and from that rule governing the production of evidence which requires the facts to be proved by that party in whose knowledge they particularly lie."

1. See *ante*, § 449.

2. *Ohrloff v. Briscoll*, L. R. 1 P. C. App. 231; *Muddle v. Stride*, 9 Car. & P. 380; *The Glendarroch*, L. R. (1894) P. 226, 63 L. J. P. 89.

3. *Little Rock, etc. Railroad v. Corcoran*, 40 Ark. 375; *Little*

Rock, etc. Railway v. Harper, 44 *id.* 208.

4. *Insurance Co. of North America v. The Railroad*, 152 Ind. 333, 53 N. E. Rep. 382; *Railroad Co. v. Sherwood*, 132 Ind. 129, 31 N. E. Rep. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339, citing *Hutchinson on Carr.*; *Reid v. The Railroad*, 10 Ind. App. 385, 35 N. E. Rep. 703, 53 Am. St. Rep. 391; *Railway Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. Rep. 1138.

5. *Kallman v. United States Express Co.*, 3 Kan. 205; *The Emily v. Carney*, 5 *id.* 645; *Kansas, etc. Railway v. Reynolds*, 8 *id.* 623. But see *Chicago, etc. R'y Co. v. Dunlop*, — Kan. —, 80 Pac. Rep. 34.

6. *Price v. Uriel*, 10 La. Ann. 413; *New Orleans, etc. Ins. Co. v. Railroad*, 20 *id.* 302; *Kirk v. Folsom*, 23 *id.* 584; *Kelham v. The Kensington*, 24 *id.* 100.

7. *Morse v. The Railway*, 97 Me. 77, 53 Atl. Rep. 874; *Sager v. The Railroad*, 31 Me. 228.

souri,⁸ New York,⁹ Pennsylvania,¹⁰ Rhode Island,¹¹ Tennessee,¹² Wisconsin¹³ and the United States¹⁴ courts, and seem to

8. *Read v. The Railroad*, 60 Mo. 199; *Wolf v. The American Ex. Co.*, 43 *id.* 421; *Davis v. The Railway*, 89 Mo. 340; *Heil v. The Railway*, 16 Mo. App. 363; *McBeath v. The Railway*, 20 Mo. App. 445; *Witting v. The Railroad*, 28 Mo. App. 103; *s. c.* 101 Mo. 631, 14 S. W. Rep. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; *E. O. Standard Milling Co. v. Transit Co.*, 122 Mo. 258, 26 S. W. Rep. 704; *Otis v. The Railway*, 112 Mo. 622, 20 S. W. Rep. 676; *Anderson v. The Railway*, 93 Mo. App. 677, 67 S. W. Rep. 707; *George v. The Railway*, 57 Mo. App. 358; *Flynn v. The Railway*, 43 Mo. App. 424; *Griffin v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 1015. The earlier Missouri cases, however, did not sustain this rule. See *Hill v. Sturgeon*, 28 Mo. 323; *Drew v. Transit Co.*, 3 Mo. App. 495.

9. *Lamb v. The Railroad*, 46 N. Y. 271. But see the dissenting opinion of Peckham, J., in this case; *Cochran v. Dinsmore*, 49 *id.* 249; *Steers v. The Steamship Co.*, 57 *id.* 1; *Westcott v. Fargo*, 61 *id.* 542; *Whitworth v. The Railway*, 45 N. Y. Super. 602; *Sutro v. Fargo*, 41 N. Y. Super. 231; *Thyll v. The Railroad*, 87 N. Y. Supp. 345, 92 App. Div. 513; *Rowan v. Express Co.*, 80 N. Y. Supp. 226, 80 App. Div. 31; *Dobson v. The Railroad*, 78 N. Y. Supp. 82, 38 Misc. 582; *Sejalón v. Woolveston*, 64 N. Y. Supp. 48, 31 Misc. 752; *Campe v. Weir*, 58 N. Y. Supp. 1082, 28 Misc. Rep. 243; *Sherwood v. The Railway*, 33 N. Y. Supp. 771, 86 Hun, 556; Van

Akin v. Railroad Co., 87 N. Y. Supp. 871, 92 App. Div. 23. But see *Beardslee v. Richardson*, 11 Wend. 25.

10. *Goldey v. The Railroad*, 30 Penn. St. 242; *Farnham v. The Railroad*, 55 *id.* 53; *Patterson v. Clyde*, 67 *id.* 500; *Colton v. The Railroad*, 67 *id.* 211. But see *Whitesides v. Russell*, 8 Watts & S. 44; *Hays v. Kennedy*, 41 Penn. St. 378; *Schaeffer v. The Railroad*, 168 Penn. St. 209, 31 Atl. Rep. 1088, 47 Am. St. Rep. 884; *Buck v. The Railroad*, 150 Penn. St. 170, 24 Atl. Rep. 678, 30 Am. St. Rep. 800; *Long v. The Railroad*, 147 Penn. St. 343, 23 Atl. Rep. 459, 30 Am. St. Rep. 732, 14 L. R. A. 741.

11. *Hubbard v. Harnden Ex. Co.*, 10 R. I. 244.

12. *Louisville, etc. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314; *Railway Co. v. Stone & Haslett*, 112 Tenn. 348, 79 S. W. Rep. 1031, 105 Am. St. Rep. 955, citing *Hutchinson on Carr.*; *Railway Co. v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691, citing this section.

13. *Schaller v. The Railway*, 97 Wis. 31, 71 N. W. Rep. 1042.

14. *Clark v. Barnwell*, 12 How. 272; *Railroad Co. v. Reeves*, 10 Wall. 176; *Transportation Co. v. Downer*, 11 *id.* 129; *Hunt v. Propeller Cleveland*, 6 McLean, 76; *The Black Warrior*, 1 McAll. 181; *Christie v. The Craighton*, 41 Fed. Rep. 62; *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *Cau v. The Railroad*, 194 U. S. 427; *s. c.* 113 Fed. 91, 51 C. C.

be supported by a preponderance of authority. It is also, probably, the rule in Iowa.¹⁵

A. 76; Washburn Crosby Co. v. Johnston & Co., 125 Fed. 273, 60 C. C. A. 187; The Lennox, 90 Fed. 308; The Henry B. Hyde, 90 Fed. 115, 32 C. C. A. 534, 61 U. S. App. 147; The Isaac Reed, 82 Fed. 566; The Warren Adams, 74 Fed. 413, 20 C. C. A. 486, 38 U. S. App. 356; The Hindoustan, 67 Fed. 794, 14 C. C. A. 650, 35 U. S. App. 173; Crowell v. Union Oil Co. 107 Fed. 302, 46 C. C. A. 296; The Flintshire, 69 Fed. 471; The Timor, 67 Fed. 356, 14 C. C. A. 412, 25 U. S. App. 278, reversing 61 Fed. 633 and 46 Fed. 859.

15. Mitchell v. United States Exp. Co., 46 Iowa, 214.

In Witting v. The Railway Co., 101 Mo. 631, 14 S. W. Rep. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602, Black, J., in giving what he conceives to be the true reason for sustaining this rule, says: "The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances. When the carrier brings himself within the exception, he need go no further to relieve himself from his liability as insurer. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof. If the cause of action stands on negligence of the carrier, and not on the common-law liability of the carrier as an insurer, the burden of proof is upon the plaintiff, from the beginning

to the end of the case. We do not see that there is anything so unreasonable in the rule as some courts seem to think, when it is remembered that by the common law the common carrier is regarded as an insurer of the safety of the goods against all losses, except such as are caused by the act of God or the public enemy. He may contract against this liability as an insurer, but he cannot contract against his negligence or that of his servants. Though the goods may be carried under a special contract relieving him from the liability of an insurer, still he is none the less a common carrier; and the question of negligence is to be determined in the light of the fact that he is a common carrier, and of the duties which he has assumed to perform. He is bound to use due care in the transportation of goods, regardless of any common-law liability as an insurer." But in this case the court permitted the case to go to the jury upon very slight evidence of negligence.

But in Pennsylvania Railroad v. Miller, 87 Penn. St. 395, it was held that when the carrier refuses to give the shipper any explanation as to the manner in which his goods have been damaged, even when the damage arises from one of the excepted causes, a presumption of negligence arises against the carrier which it must rebut. In this case the shipper simply proved the loss and the carrier's refusal to account for it, without himself attempting to

Sec. 1356. (§ 768.) Importance of question.—This question sometimes becomes of the utmost importance in actions against the carrier; for when the proof has left it in doubt whether his negligence has occasioned or contributed towards bringing about the loss, the verdict must depend upon the answer to the inquiry, upon whom rests the burden of the proof. If upon the plaintiff, he cannot recover if his proof leave the question really in doubt. But if upon the defendant, upon the ground that the presumption of negligence is against him, that presumption must prevail unless he succeed in showing that there was not negligence; and where the question upon the proof is left in doubt, the plaintiff would be entitled to a recovery. Thus in *Muddle v. Stride*,¹⁶ in which the burden of the proof of negligence was held to be upon the plaintiff, the defendant having shown that the damage to the goods was caused by the act of God, the jury was charged by Lord Denman that if, on the whole, in their opinion, it was left in doubt what the cause of the damage was, then the defendants would be entitled to the verdict, because they were clearly to see that the defendants were guilty of negligence before they could find a verdict against them; and that if it should turn out, in consideration of the case, that the injury might as well be attributable to the one cause as the other, then also the defendants would not be liable for negligence.¹⁷

show how it occurred. Previous to the trial the carrier had repeatedly refused to give the shipper any information as to the loss; but at the trial it proved that the train containing the shipper's goods had taken fire through some unknown cause, and that the damage occurred in spite of the utmost efforts of the train hands to extinguish the flames. The carrier was exempted from any liability on account of fire. The court held that under these facts the burden of proof was

upon the carrier to repel the presumption of its negligence, and that the mere giving of the above evidence did not, *ipso facto*, repel the presumption. "It was a question for the jury whether the evidence satisfactorily accounted for the fire and also for the conduct of the defendants toward the plaintiff, for the latter bore on the credibility of the evidence of the former."

16. 9 Car. & P. 380.

17. And see *Lamb v. The Railroad*, 46 N. Y. 271.

Sec. 1357. Burden of proof where property injured consists of live stock.—If live stock which is being transported is under the carrier's exclusive control, its delivery at destination in an injured condition will be *prima facie* evidence that the injury arose from some cause for which he was responsible, and he will be liable to the extent to which the shipper is damaged unless he can show that the injury resulted from a cause for which he will be excused by the law or by the terms of his contract.¹⁸ The reason for the rule is said to be that the carrier, on account of his exclusive control of the stock and of the instrumentalities of transportation, has means of information which are superior to those of the shipper for determining the causes which occasioned the injury. But where, as is frequently the case, the shipper accompanies his live stock for the purpose of caring for it during the transportation, the same rule as to the burden of proof is held not to apply. The stock is not in the carrier's exclusive control or custody, nor are his means of information superior to those of the shipper who is in a position to know as well as the carrier of the causes which produced the injury. In order, therefore, that the shipper who accompanies his live stock may recover for injuries received by it during the transportation, he must not only show that he himself was free from negligence, but that the injuries were caused by a breach of duty on the part of the carrier.¹⁹ If,

18. *Richmond, etc. R. Co. v. Trousdale & Son*, 99 Ala. 389, 13 So. Rep. 23, 42 Am. St. Rep. 69; *Hinkle v. The Railway*, 126 N. Car. 932, 36 S. E. Rep. 348, 78 Am. St. Rep. 685; *Mitchell v. The Railroad*, 124 N. Car. 236, 32 S. E. Rep. 671, 44 L. R. A. 515; *Dow v. Packet Co.*, 84 Me. 490, 24 Atl. Rep. 945; *Railway Co. v. Woodward*, 164 Ind. 360, 72 N. E. Rep. 558; *s. c.* 164 Ind. 360, 73 N. E. Rep. 810; *Lindsley v. The Railway*, 36 Minn. 539.

19. *Faust v. The Railway*, 104 Iowa, 241, 73 N. W. Rep. 623, 65

Am. St. Rep. 454; *Grieve v. The Railroad*, 104 Iowa, 659, 74 N. W. Rep. 192; *Railway Co. v. Vaughan*, (Tex. Civ. App.) 41 S. W. Rep. 415; *Gulf, etc. R'y Co. v. Williams*, 4 Tex. Civ. App. 294, 23 S. W. Rep. 626; *Railroad Co. v. Harned*, 23 Ky. Law Rep. 1651, 66 S. W. Rep. 25; *Railway Co. v. Reeves*, 97 Va. 284, 33 S. E. Rep. 606, 16 Am. & Eng. R. Cas. (N. S.) 166; *Railway Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. Rep. 829. See, also, *Pennsylvania R. Co. v. Raiordon*, 119 Penn. St. 577; *Hussey v. The Sargossa*, 3 Woods,

however, the contract of shipment does not contemplate that the shipper shall ride in the car with his stock, but in the caboose attached to the train, and it is shown that he was not in actual control of the car containing the stock when an injury to the stock occurred, it is said that, to shift the burden of proof upon the carrier, he need only show that the injury was sustained during the transportation, and that he himself was guilty of no negligence which contributed to it.²⁰

V. THE MEASURE OF DAMAGES.

Sec. 1358. (§ 768b.) Difference in measure between actions of tort and contract.—"In actions upon contract," says a learned writer on the law of damages,²¹ "it is a rule that only such damages are recoverable as are the natural and proximate consequence of the breach. They include direct damages, and such as the parties contemplated would be likely to result from a breach when the contract was made."²² Here an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of a contract. The wrong-doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and the general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be

380; *Steamship America*, 8 Bened. 491; *Hance v. Express Co.*, 66 Mo. App. 486; *s. c.* 48 Mo. App. 179; *Crow v. The Railroad*, 57 Mo. App. 135; *Atlantic, etc. R. Co. v. Dexter*, — Fla. —, 39 So. Rep. 634; *Texas, etc. R'y Co. v. Scoggin & Brown*, — Tex. Civ. App. — 90 S. W. Rep. 521. But see *Louisville, etc. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. Rep. 311.

In *Columbus, etc. Railway v. Kennedy*, 78 Ga. 646, it is held that section 3033 of the Georgia code, which prescribes that in all cases of injury to persons or prop-

erty the injury is presumed to be the result of the carrier's negligence, applies in cases of injury to live stock shipped under a special contract limiting the carrier's liability. See, also, *Cooper v. The Railroad*, 110 Ga. 659, 36 S. E. Rep. 240.

20. *Faust v. The Railway*, *supra*.
21. *Sutherland on Damages*, I, p. 74.

22. Citing *Rhodes v. Beard*, 16 Ohio St. 581; *Brayton v. Chase*, 3 Wis. 456; *Bridges v. Stickney*, 38 Me. 361.

supposed to have foreseen and anticipated. But for breaches of contract the parties are not chargeable with damages on this principle. Whatever foresight, at the time of the breach, the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach; such as usually occur from the breach of such a contract, and as were within the contemplation of the parties, when the contract was entered into, as likely to result from a breach.'²³

Sec. 1359. (§ 768c.) The measure of damages for not accepting and carrying the goods.—The duty of the carrier to accept and carry the goods may arise either upon his common-law obligation to that effect or upon some express contract made by him in that behalf.²⁴ The measure of damages in the latter case will be treated in a later section, and as the rule in both cases is substantially the same, the former will not be separately considered.²⁵

Sec. 1360. (§ 769.) The measure of damages for the loss of the goods.—It is well settled that the measure of the damages for the loss of the goods by the carrier, when he is liable for such loss, is generally the value of the goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, deducting, however, the unpaid cost of transportation, but adding such incidental damages as naturally and proximately flow from the loss.²⁶ This, at least in the great majority of cases, will be the extent of the loss of the shipper, and of the compensation for its breach, which it may be reasonably supposed was in the contemplation of the parties at the time of the making of the contract.

23. Citing *Hadley v. Baxendale*, 9 Exch. 341; *Candee v. Telegraph Co.*, 34 Wis. 479. See, also, *Schumaker v. Railroad Co.*, 46 Minn. 39, 48 N. W. Rep. 559.

Webb, 20 Tex. Civ. App. 438, 49 S. W. Rep. 526.

25. See *post*, § 1370.

26. *England*: *Brandt v. Bowlby*, 2 B. & Ad. 932; *O'Hanlon v. The Railway*, 6 Best & S. 484.

24. *Missouri, etc. R'y Co. v.*

Sec. 1361. (§ 770.) Same subject—Exceptions to the rule.
 —But this is by no means an inflexible rule; and though its justice is apparent, when the owner of the goods himself is to take them at their destination, there to use or to sell them on his

United States: The Arctic Bird, 109 Fed. 167; Mobile, etc. R'y Co. v. Jurey, 111 U. S. 584.

Alabama: Echols v. The Railroad, 90 Ala. 366, 7 So. Rep. 655; Louisville, etc. R. Co. v. Gilmer, 89 Ala. 534, 7 So. Rep. 654; Louisville, etc. R. Co. v. Kelsey, 89 Ala. 287, 7 So. Rep. 648.

Arkansas: Railway Co. v. Coolidge, — Ark. —, 83 S. W. Rep. 333, 67 L. R. A. 555.

California: Ringgold v. Haven, 1 Cal. 108.

Illinois: The Northern Transportation Co. v. McClary, 66 Ill. 233.

Iowa: Robinson v. Transportation Co., 45 Iowa, 470.

Louisiana: Price v. Ship Uriel, 10 La. Ann. 412.

Maine: Perkins v. The Railroad, 47 Me. 573.

Massachusetts: Spring v. Haskell, 4 Allen, 112.

Maryland: Baltimore, etc. R. Co. v. Pumphrey, 59 Md. 390.

Missouri: Gray v. The Packet Co., 64 Mo. 47; Lachner v. Express Co., 72 Mo. App. 13; Horner v. The Railroad, 70 Mo. App. 285.

Nebraska: Railroad Co. v. Lawler, 40 Neb. 356, 58 N. W. Rep. 968.

New Hampshire: Hackett v. The Railroad, 35 N. H. 390.

New York: Sherman v. Wells, 28 Barb. 403; Sturgess v. Bissell, 46 N. Y. 462; Rice v. The Steamboat Co., 56 Barb. 384.

Ohio: McGregor v. Kilgore, 6 Ohio, 358.

Pennsylvania: Gillingham v. Dempsey, 12 Serg. & R. 183.

South Carolina: Shaw v. The Railroad, 5 Rich. 462.

Tennessee: Dean v. Vaccaro, 2 Head, 488; Edminson v. Baxter, 4 Hayw. 112; Railway Co. v. Kelly, 91 Tenn. 699, 20 S. W. Rep. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691; s. c. 91 Tenn. 708, 20 S. W. Rep. 314.

Texas: Texas, etc. R'y Co. v. Tankersley, 63 Tex. 57; Gulf, etc. R'y Co. v. Roberts, (Tex. Civ. App.) 85 S. W. Rep. 479; Railway Co. v. Burns, (Tex. Civ. App.) 80 S. W. Rep. 104; Grayson County Natl. Bank v. The Railway, (Tex. Civ. App.) 79 S. W. Rep. 1094; Railroad Co. v. Efron, (Tex. Civ. App.) 38 S. W. Rep. 639.

Vermont: Laurent v. Vaughn, 30 Vt. 90.

Virginia: Railway Co. v. F. W. Stock & Sons, — Va. —, 51 S. E. Rep. 161.

Wisconsin: Whitney v. The Railway, 27 Wis. 327; Chapman v. The Railway, 26 Wis. 295.

Canada: Rosenbloom v. The Railway, Rap. Jud. Que., 16 C. S. 360.

If part of a consignment of goods is lost in shipment, and the goods delivered are of the same kind and quality as those lost, evidence as to the value of those delivered is admissible to fix relatively the value of those lost. Marquis v. Wood, 61 N. Y. Supp. 251, 29 Misc. 590.

But where the goods were lost

own account, yet if they have been consigned to another at such destination, who is to take them at a price which the owner has fixed upon them, as is often the case in commercial dealings, the owner could recover as damages for their loss no more than the price which he had himself fixed upon them, with interest from the time when they should have been delivered.¹ For damages for the breach of a contract can never exceed the benefit which would accrue to the party from its performance. But if the carrier should convert the goods, and should realize from them more than the market value at their destination, he would be required to account for all that he had received for them.

Sec. 1362. (§ 770a.) Measure of damages for injury to goods during transportation.—Where the goods have not been lost or destroyed during the transportation, but are delivered in a depreciated condition attributable to causes for which the carrier is responsible, the measure of damages is the difference, after deducting the cost of transportation, between their value as actually delivered and as they should have been delivered, with interest,² and with such other damages as have naturally

before the carrier's ship had left port or, commenced its voyage, it was held that the measure of damages was their value at the port of departure and not at the port of destination. *Lakeman v. Grinnell*, 5 Bosw. 625. And this was said to be the rule laid down in *Wheelwright v. Beers*, 2 Hall, 391; *Dusar v. Murgatroyd*, 1 Wash. 13.

1. *Magnin v. Dinsmore*, 62 N. Y. 35.

Where the bulk of the shipper's property consisted of Indian curiosities which had no market value in the accepted sense, its salableness depending upon finding a purchaser of means interested in Indian curiosities, and it was sunk in mid ocean, the value

at the place of shipment, as shown by the testimony of experts, is the proper measure of damages. *La Bourgoyne*, — C. C. A. —, 144 Fed. 781.

2. *United States: Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. R. 444, 37 L. Ed. 292; *Railway Co. v. Arnett*, 126 Fed. 75, 61 C. C. A. 131; *Railway Co. v. Truskett*, 104 Fed. 728, 44 C. C. A. 179; *s. c.* 186 U. S. 480, 46 L. Ed. 1259; *Swift & Co. v. Furness Witty & Co.*, 87 Fed. 345.

Arkansas: Railway Co. v. De Shong, 63 Ark. 443, 39 S. W. Rep. 260.

Illinois: Railway Co. v. Patton, 203 Ill. 376, 67 N. E. Rep. 804; *s. c.* 104 Ill. App. 550.

Where the carrier negligently shipped cattle in cars upon which were tacked signs, "Southern Cattle," thus indicating that the cattle were deceased, the measure of damages was held to be the difference between the market value of the cattle on their arrival at destination with reference to the cars and the market value of like cattle at such time and place. *Wabash R. Co. v. Campbell*, — Ill. —, 76 N. E. Rep. 346.

Louisiana: *Silverman v. The Railroad*, 51 La. Ann. 1785, 26 So. Rep. 447; *Henderson v. Maid of Orleans*, 12 La. Ann. 352.

Massachusetts: *Smith v. The Railroad*, 12 Allen, 531; *Cutting v. The Railway*, 13 Allen, 381; *Ingle-dew v. The Railroad*, 7 Gray, 86.

Minnesota: *Davis v. The Railway*, 70 Minn. 37, 72 N. W. Rep. 823, citing *Hutchinson on Carr.*

Missouri: *Matney v. The Railway*, 75 Mo. App. 233; *Heil v. The Railway*, 16 Mo. App. 363.

New York: *King v. Sherwood*, 48 N. Y. Supp. 34, 22 App. Div. 548.

Where only part of a consignment of goods is damaged, the owner cannot sell the undamaged goods at the same price as the damaged goods and then recover the difference between the value of the undamaged goods when shipped and the amount received for them when sold. *D'Olier v. Railroad Co.*, 98 N. Y. Supp. 649.

Texas: *Railway Co. v. Stanley*, 89 Tex. 42, 33 S. W. Rep. 109; *Railway Co. v. Sherrod*, (Tex. Civ. App.) 87 S. W. Rep. 363; *Railway Co. v. Stephens*, (Tex. Civ. App.) 86 S. W. Rep. 933; *Railway Co. v. Henry*, (Tex. Civ. App.) 81 S. W. Rep. 334; *Railway Co. v. Ware*

& Walker, (Tex. Civ. App.) 78 S. W. Rep. 961; *Railway Co. v. Murtishaw*, (Tex. Civ. App.) 78 S. W. Rep. 953; *Railway Co. v. Houghton*, 4 Tex. Ct. Rep. 688, 68 S. W. Rep. 718; *Railway Co. v. Butler*, 26 Tex. Civ. App. 494, 63 S. W. Rep. 650; *Railway Co. v. Smith*, 11 Tex. Civ. App. 550, 32 S. W. Rep. 828; *Railway Co. v. Barber*, Tex. Civ. App. 30 S. W. Rep. 500; *Railway Co. v. Grant*, 6 (Tex. Civ. App.) 674, 26 S. W. Rep. 286; *Railway Co. v. Silegman*, (Tex. Civ. App.) 23 S. W. Rep. 298, citing *Hutchinson on Carr.*; *Gulf, etc. R'y Co. v. Terry & McAfee*, — Tex. Civ. App. —, 89 S. W. Rep. 792.

Where there is no market value at destination, resort should be had to the market value at the next nearest market. *Railway Co. v. Williams*, (Tex. Civ. App.) 31 S. W. Rep. 556. Where the goods pass over the line of several connecting carriers, the market value at the point of destination controls and not the market value at the terminus of the road of an intermediate carrier who is responsible for the injury. *Texas, etc. Ry. Co. v. White*, (Tex. Civ. App.) 80 S. W. Rep. 641, *Railway Co. v. De Shong*, 63 Ark. 443, 39 S. W. Rep. 260. In an action for damages for injuries to race horses during transportation, the opinion of witnesses who are engaged in buying, selling and handling trotting and pacing horses, and who have seen the horses in question frequently, before the injury, upon the track and in races, and know their speed, quality, etc., is competent as to the value of the horses. *Chicago, etc. R'y Co. v. Calumet Stock*

and proximately resulted from the injury.³ Under the latter head the owner would be entitled to recover for reasonable expenses in seeking to reclaim the goods,⁴ or in restoring them to their former condition,⁵ or endeavoring to reduce the loss to its lowest amount.⁶

Sec. 1363. (§ 770b.) Same subject—Measure of damages where goods not intended for sale or have no market value—Family portrait—Second-hand goods—Building plans.—"The general rule of damages in trover, and in contract for not delivering goods," say the court in Massachusetts,⁷ "undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner." In a case in Texas⁸ it is said: "The lost articles seemed to be

Farm, 194 Ill. 9, 61 N. E. Rep. 1095, 88 Am. St. Rep. 68. Evidence of the pedigree of a race horse, and that some of his blood relations have a record for speed, is competent as affecting his value. *Railroad Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. Rep. 732.

The failure to deduct the freight charges from the damages allowed is not error in the absence of evidence that such charges have not been paid. *Railway Co. v. Craycraft*, 12 Ind. App. 203, 39 N. E. Rep. 523.

3. *Baltimore, etc. R. Co. v. Pumphrey*, 59 Md. 390; *Texas, etc. R. Co. v. Bigham*, 4 Tex. Ct. Rep. 658, 67 S. W. Rep. 522.

4. *North, etc. R. Co. v. Akers*, 4 Kan. 453.

5. *Railway Co. v. Woodward*, 164 Ind. 360, 72 N. E. Rep. 558; s. c. 164 Ind. 360, 73 N. E. Rep. 810; *Galveston, etc. R'y Co. v. Tuckett*, (Tex. Civ. App.) 25 S. W. Rep. 670.

6. *Winne v. The Railroad*, 31 Iowa, 583; *Jackson, etc. Iron Works v. Hurlburt*, 158 N. Y. 34, 52 N. E. Rep. 665, 70 Am. St. Rep. 432; s. c. 36 N. Y. Supp. 808, 15 Misc. 93.

7. *Green v. Railroad Co.*, 128 Mass. 221, citing *Stickney v. Allen*, 10 Gray. 352. See, also, *The Protection*, 102 Fed. 516, 42 C. C. A. 489.

8. *International, etc. R'y Co. v. Nicholson*, 61 Tex. 550. See, also, *Cooney v. The Pullman Palace Car Co.*, 121 Ala. 368, 25 So. Rep. 712, 53 L. R. A. 690, citing

of such a character, viz., second-hand clothing, books and table furniture which had been used by the plaintiff, that they could not be said to have to him a value at one place different from what they possessed at another. He could hardly have supplied himself in the market with goods in the same condition and so exactly suited to his purposes as were those of which he had been deprived. As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover. Not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family." Where plans for the building of a house were lost in transportation, the carrier not knowing what they were or to what use they were to be put, the measure of damages was held to be the cost of new plans and

Hutchinson on Carr.; *Galveston, etc. R'y Co. v. Fales*, (Tex. Civ. App.) 77 S. W. Rep. 234; *Express Co. v. Williams*, 6 Tex. Ct. Rep. 345, 71 S. W. Rep. 314; *Railroad Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43; *Brooke v. Steamship Co.*, 93 N. Y. Supp. 369; *Litt v. The Railroad*, 64 N. Y. Supp. 108, 50 App. Div. 550; *Mitchell v. Weir*, 45 N. Y. Supp. 1085, 19 App. Div. 183; *Simpson v. The Railroad*, 38 N. Y. Supp. 341, 16 Misc. 613; *Glovinsky v. Steamship Co.*, 26 N. Y. Supp. 751, 6 Misc. 388; *Hebard v. Riegel*, 67 Ill. App. 584; *Parmelee v. Raymond*, 43 Ill. App. 609; *Benedict v. Railway Co.*, — Tex. Civ. App. —, 91 S. W. Rep. 811.

In *Denver, etc. R. Co. v. Frame*, 6 Colo. 385, it is said: "As to certain other goods, such as wear-

ing apparel in use and certain articles of household goods and furniture, kept for personal use and not for sale, while they have a real extrinsic value to the owner, they may have little or no market value whatever at the point of destination; they are not shipped as marketable goods. The market value of many such articles depends on style and fashion, irrespective of actual value for use. In some cases the owner may not be able to replace them in any market. In such cases the value is to be properly fixed by considerations of cost and of actual worth at the time of the loss, without reference to what they could be sold for in a particular market, or hawked off for by a second-hand dealer where they happened to be unloaded."

See, also, *Railway Co. v. Mc-*

the expenses incurred in procuring them, but not the loss from the delay in building the house.⁹

Sec. 1364. (§ 770c.) Same subject—How when amount of loss limited by contract.—As has been seen in earlier sections,¹⁰ it is competent for the parties, at the time of the shipment, by contract to that effect, to agree upon the value of the goods, and that the carrier shall not be liable in case of loss beyond the value so agreed upon. The question has there been so fully treated that it is unnecessary to do more than to notice that where the amount has been lawfully agreed upon the recovery cannot exceed it,¹¹ except in those cases in which the agreement becomes inoperative because of the carrier's negligence,¹² or has been waived.¹³

Sec. 1365. (§ 770d.) Right of consignee to refuse to receive injured goods.—As a general rule, the doctrine that where goods are injured the owner may abandon them as for a total loss and sue for their value does not apply to contracts of affreightment.¹⁴ The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not of itself justify the consignee in refusing to receive them, but he must accept them and hold the carrier responsible for the injury.¹⁵ Where, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them and sue the carrier for their

Carty, (Tex. Civ. App.), 94 S. W. Rep. 178. In this latter case it was held proper to allow the passenger to testify as to the value of the articles lost.

9. *Mather v. Express Co.*, 138 Mass. 55.

10. *Ante*, § 425 *et seq.*

11. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; *Brown v. Steamship Co.*, 147 Mass. 58.

12. *Georgia Pac. R'y Co. v. Hugbart*, 90 Ala. 36, 8 S. Rep. 62; *Galveston, etc. R'y Co. v. Ball*, 80

Tex. 602, 16 S. W. Rep. 441. See, *ante*, § 477.

13. *Chicago, etc. R. Co. v. Katzenbach*, 118 Ind. 174.

14. *Silverman v. The Railway*, 51 La. Ann. 1785, 26 So. Rep. 447.

15. See *post*, § 1372; *Corso v. The Railroad*, 48 La. Ann. 1286, 20 So. Rep. 752; *Brand v. Weir*, 57 N. Y. Supp. 731, 27 Misc. 212, citing *Hutchinson on Carr.*; *Gulf, etc. R'y Co. v. Pitts*, — Tex. Civ. App. —, 83 S. W. Rep. 727, citing *Hutchinson on Carr.*; *Gulf*

value.¹⁶ Thus where a patented machine, while being transported from the manufacturer's, was so injured as to be practically worthless and to cost as much to repair it as to buy a new one, it was held that the consignee was justified in refusing to receive it, and might recover from the carrier the value of the machine and the amount paid for carriage with interest from the time when it should have been allowed.¹⁷ But where one of a number of boxes shipped was missing, it was held that the consignee was not justified in refusing to receive the balance, but was bound to accept them and hold the carrier for the missing portion.¹⁸

So where the consignor, who was also the consignee, sent goods forward in sealed cars with directions, "notify J. W. Sharp," and the carrier permitted an unauthorized examination of the goods at destination by J. W. Sharp's agent, whereby they were refused, it was held that the carrier's wrongful act furnished no basis for an action for their value.¹⁹

Sec. 1366. (§ 771.) Damages for delay in the transportation and delivery.—If the goods are intended for sale in the market at destination, and the carrier unreasonably and negligently delay their transportation, it is now universally agreed, whatever doubts may have been at one time entertained upon the subject,²⁰ that the general rule by which the damages are to be computed, if goods of the particular kind have fallen in

etc. *R'y Co. v. Everett*, — Tex. Civ. App. —, 83 S. W. Rep. 257, citing *Hutchinson on Carr.*

16. *Brand v. Weir, supra*. Where the consignee refused to receive the goods from the carrier because they were damaged, and the carrier thereupon sold them, and it appeared that in a suit for their value a verdict was returned against the carrier which was the same in amount as the sum the consignee would have recovered if he had accepted the goods and sold them for their reasonable value, the fact that the refusal

of the consignee to receive them was wrongful will be immaterial. *Gulf, etc. R'y Co. v. Pitts, supra*.

17. *Thomas, etc. Co. v. The Railway*, 62 Wis. 642, *distinguishing Brown v. The Railway*, 54 Wis. 342.

18. *Gulf, etc. R'y Co. v. Booton*, (Tex. Civ. App.) 15 S. W. Rep. 502; *Gulf, etc. R'y Co. v. Jackson*, 4 Tex. Civ. App. 74, 15 S. W. Rep. 128.

19. *Dudley v. Railway Co.*, — W. Va. —, 52 S. E. Rep. 718.

20. *Wibert v. The Railroad*, 19 Barb. 36; *Jones v. The Railroad*,

market value during the delay, or if they have depreciated in quality because of the delay, is the difference between the market value when the goods should have arrived and the value at the time of their delivery, the carrier being liable to the extent of the depreciation,²¹ with interest from the time when they

29 *id.* 633; *Kirkland v. Leary*, 2 Sweeney, 677; *Conger v. The Railroad*, 6 Duer. 375.

21. *England*: *Wilson v. The Railway*, 9 Com. B. (N. S.) 632; *Collard v. The Railway*, 7 Hurl. & N. 79; *Dunn v. Donald Currie & Co.*, (1902) 2 K. B. Div. 614, 71 L. J. K. B. 963.

Alabama: *South, etc. R. Co. v. Wood*, 72 Ala. 451.

Arkansas: *St. Louis, etc. R'y Co. v. Phelps*, 46 Ark. 485; *Railway Co. v. Coolidge*, — Ark. —. 83 S. W. Rep. 333, 67 L. R. A. 555.

Georgia: *Atlanta, etc. R. Co. v. Grate Co.*, 81 Ga. 602, 9 S. E. Rep. 600; *Columbus, etc. R'y Co. v. Flournoy*, 75 Ga. 745.

Illinois: *Railway Co. v. Hellprin*, 95 Ill. App. 402.

Iowa: *Hudson v. The Railroad*, 92 Iowa, 231, 60 N. W. Rep. 608, 54 Am. St. Rep. 550; *Clark v. Am. Ex. Co.*, — Iowa, —, 106 N. W. Rep. 642.

Kansas: *Railway Co. v. McGrath*, 3 Kan. App. 220, 44 Pac. 39.

Kentucky: *Railroad Co. v. Smith*, 14 Ky. Law Rep. 814; *Newport News, etc. R. Co. v. Mercer*, 96 Ky. 475, 29 S. W. Rep. 301, citing *Hutchinson on Carr.*

Maine: *Weston v. The Railway*, 54 Me. 376; *Dunham v. The Railroad*, 70 Me. 164.

Massachusetts: *Waite v. Gilbert*, 10 Cush. 177; *Ingledeu v.*

The Railroad, 7 Gray, 86; *Cutting v. The Railway*, 13 Allen, 381.

Michigan: *Sisson v. The Railroad*, 14 Mich. 489; *Ward's Lake Co. v. Elkins*, 34 Mich. 439.

Minnesota: *Whalon v. Aldrich*, 8 Minn. 346.

Mississippi: *Vicksburg, etc. R. Co. v. Ragsdale*, 46 Miss. 458.

Missouri: *Sloop v. The Railroad*, 93 Mo. App. 605, 67 S. W. Rep. 956; *Perry v. The Railway*, 89 Mo. App. 49; *Glasscock v. The Railway*, 86 Mo. App. 114; *Wilson v. The Railway*, 66 Mo. App. 388.

Nebraska: *Chicago, etc. R'y Co. v. Todd*, — Neb. —, 105 N. W. Rep. 83.

New York: *Ward v. The Railroad*, 47 N. Y. 29; *Kent v. The Railroad*, 22 Barb. 278; *Katz v. The Railway*, 91 N. Y. Supp. 720; *Roth, etc. Co. v. Steamship Co.*, 88 N. Y. Supp. 987, 44 Misc. 237; s. c. 86 N. Y. Supp. 25.

This rule, however, is not an inflexible one and may be varied according to the circumstances of a particular case. *Isham v. Erie R. Co.*, 98 N. Y. Supp. 609.

Tennessee: *East Tenn., etc. R. Co. v. Hale*, 85 Tenn. 69; *Railroad Co. v. Southern, etc. Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. Rep. 933, 50 L. R. A. 729, citing *Hutchinson on Carr.*

Texas: *Gulf, etc. R'y Co. v. McCarty*, 82 Tex. 608, 18 S. W. Rep. 716; *Railway Co. v. Beattie* (Tex. Civ. App.) 88 S. W. Rep. 367;

should have been delivered.²² The time above spoken of "when the goods should have arrived" is the time fixed by the contract, if any, and if not, then a reasonable time.²³

In addition to this difference in market value, the carrier will be liable also for such other and incidental damages as naturally and proximately flow from the delay. If, therefore, the consignee is put to expense or trouble in making further applications or journeys to get the goods,²⁴ or in searching for them,²⁵ or in caring for them after their arrival until the next

Railway Co. v. Halsell, (Tex. Civ. App.) 81 S. W. Rep. 1241; *Garlington v. The Railway*, (Tex. Civ. App.) 78 S. W. Rep. 368; *Railway Co. v. Botts*, 5 Tex. Ct. Rep. 810, 70 S. W. Rep. 113; *Railway Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. Rep. 119; *Railway Co. v. Truesdell*, 21 Tex. Civ. App. 125, 51 S. W. Rep. 272; *Railroad Co. v. Garcia*, (Tex. Civ. App.) 26 S. W. Rep. 780; *Railway Co. v. Batte*, (Tex. Civ. App.) 94 S. W. Rep. 345; *Railway Co. v. Stribling*, (Tex. Civ. App.), 94 S. W. Rep. 436.

Vermont: *Newell v. Smith*, 49 Vt. 255; *King v. Woodbridge*, 34 Vt. 565.

Wisconsin: *Peet v. The Railway*, 20 Wis. 594.

In the case of *The Parana*, 2 P. Div. 118, the English court of appeal held that damages for a fall in the market during a voyage by sea unreasonably delayed could not be recovered. The American case of *Ward v. Railway Co.*, 47 N. Y. 29, was distinguished.

22. Upon the right to interest, see *Houston, etc., Ry. Co. v. Jackson*, 62 Tex. 209, where many cases and text-writers are cited; *Railroad Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292; *La Conner*

Trading Co. v. Widmer, 136 Fed. 177; *Gann v. The Railway*, 72 Mo. App. 34; *Railway Co. v. Webb*, 20 Tex. Civ. App. 438, 49 S. W. Rep. 526. In *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604, it is said that interest is to be computed from the date of the breach of the contract if the action be brought on the contract, and from the date of the injury if the action be in tort.

Where the statute does not allow interest on a claim for damages, none can be recovered. *Railroad Co. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. Rep. 933, 50 L. R. A. 729.

23. *Columbus, etc., Ry. Co. v. Flournoy*, 75 Ga. 745.

24. *Waite v. Gilbert*, 10 Cush. 177; *Deming v. Railroad Co.*, 48 N. H. 455; *Davis v. Railroad Co.*, 1 Disney, 23; *Murrell v. Express Co.*, 54 Ark. 22, 14 S. W. Rep. 1098.

25. *Farwell v. Davis*, 66 Barb. 73; *Chicago, etc., Ry. Co. v. Stanbro*, 87 Ill. 195. But see *Ingledew v. Railroad Co.*, 7 Gray, 86; *Briggs v. Railroad Co.*, 28 Barb. 515; *Woodger v. Railway Co.*, L. R. 2 C. P. 318.

market day,²⁶ or in making reasonable efforts to avert the loss or make it as light as possible,²⁷ or in sending them elsewhere in order to find a market for them,²⁸ he is entitled to recover for these injuries also. Where, by the delay, the goods have become worthless, the owner may recover as for their loss.²⁹ Excuses for delay, such as strikes and kindred occurrences, have been considered in earlier sections.³⁰

If, by reason of a delay, there is no market value for the goods at the place of destination, and in consequence they are shipped to another market, the measure of damages will be the difference in value on the market at destination in the condition and at the time they should have arrived and the sum they were sold for on the other market.³¹

26. *Ayres v. The Railroad*, 75 Wis. 215; *Cleveland, etc., R. Co. v. Strong*, 56 Ill. App. 604.

27. *Laurent v. Vaughn*, 30 Vt. 90; *Shelby v. The Railway*, 77 Mo. App. 205.

A shipper of live stock, who accompanies his stock cannot, because of a delay, abandon the care of his stock and then recover to the full extent to which the stock is injured by the delay. He must use all reasonable means at his command to avert or lessen the damages which would otherwise result from the delay, and his failure to do so will limit his recovery to such damages as would have resulted from the delay had such means been used, plus such a sum as would reasonably have been expended in the use of such means. *Railway Co. v. Daggett*, 87 Tex. 322, 28 S. W. Rep. 525, *reversing* (Tex. Civ. App.) 27 S. W. Rep. 186.

28. *Black v. Baxendale*, 1 Exch. 410; *Railway Co. v. Gunter*, (Tex. Civ. App.) 86 S. W. Rep. 938; *Spann v. Transportation Co.*, 33 N. Y. Supp. 566, 11 Misc. 680.

29. *Schulze v. The Railway*, 19

Q. B. Div. 30; *Railroad Co. v. Harris*, 55 Ill. App. 159.

Upon the question of the evidence of market value admissible in these cases, see *Central R. Co. v. Skellie*, 86 Ga. 686, 12 S. E. Rep. 1017; *Railway Co. v. Edwards*, 78 Fed. 745, 24 C. C. A. 300; *Railway Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153, 32 U. S. App. 60; *Railway Co. v. Heath*, 22 Ind. App. 47, 53 N. E. Rep. 198.

Where rags packed while wet were injured by delay, but the carrier had not been informed of any need for special care or expedition, the plaintiff was allowed nominal damages only. *Baldwin v. Railway Co.*, 9 Q. B. Div. 582.

30. See, *ante*, § 657.

31. *Texas, etc. R'y Co. v. Coggin*, —Tex. Civ. App. —, 90 S. W. Rep. 523.

Where there is no difference in the value of the goods when they should have arrived and when they did in fact arrive, the shipper will nevertheless be entitled to recover nominal damages. *Clark v. Am. Ex. Co.*, — Iowa, —, 106 N. W. Rep. 642.

Sec. 1367. (§ 772.) Same subject—Special damages—Notice of special circumstances must be given to carrier when contract is made.—But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which for special reasons the shipper may desire that the transportation of his goods shall be hastened; and if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner. As where the owner of goods had made an advantageous sale of them, provided they were delivered within a certain time, and the carrier, being informed of this fact, undertook to carry and deliver them within the time, but through negligence failed to do so, whereby the plaintiff lost the advantage of his bargain, it was held that the carrier was liable for whatever the owner had lost by the failure to deliver in time, and that this would be the difference between the contract price and the market value of the goods when delivered.³² But where the goods were sold “to arrive”

32. *Deming v. The Railroad*, 48 N. H. 455; *St. Louis, etc. R’y Co. v. Mudford*, 48 Ark. 50.

Where the carrier contracts to furnish cars by a specified date with knowledge that the shipper has a contract to deliver his commodity for a certain price to persons at destination, and it fails to furnish the cars as agreed, it is liable for the profits he would have made but for its breach of contract. *Gulf, etc. R’y Co. v. Hodge*, (Tex. Civ. App.) 39 S. W. Rep. 986. Where goods intended for a special purpose were delivered to the carrier with instruc-

tions that they should go forward quickly as the contract under which they were sold required that a certain sum be forfeited after a specified date if they were not delivered before such date, and owing to a mistake on the part of the carrier they were misrouted and thereby delayed so that the owner was made to pay the forfeit, it was held that the sum forfeited being reasonable, and therefore such as could be recovered as liquidated damages, the carrier was liable to the owner for the damages he had sustained by reason of being required to

by a certain time and at a certain price, but the carrier was not informed of the fact, and knew nothing of the importance to the shipper of a prompt delivery, it was held that the carrier could be held liable only for the depreciation in the market value between the time when they should have been and the time when they were delivered.³³ It may be stated, therefore,

pay the forfeit. *Railroad Co. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. Rep. 933, 50 L. R. A. 729.

33. *Scott v. The Steamship Co.*, 106 Mass. 468. To same effect, *Gulf, etc. R'y Co. v. Cole*, (Tex.) 16 S. W. Rep. 176; *Murrell v. Express Co.*, 54 Ark. 22, 14 S. W. Rep. 1098. The leading case upon this subject is that of *Hadley v. Baxendale*, 9 Exch. 341, which was an action for damages sustained by the negligent delay of a carrier. The plaintiffs, who were the owners of a flour-mill, sent a broken shaft to the carrier to be carried to the manufacturer as a model by which to make a new one, informing the carrier at the time that the mill was stopped and that the shaft must be delivered immediately. The carriage of the shaft having been delayed, in consequence of which the new shaft was not received for some days after the time when it would have been received had the broken shaft been carried promptly, during which time the mill was stopped, the plaintiffs brought an action against the carrier for the loss of profits occasioned by the stopping of the mill during the delay in procuring the new shaft. Upon careful consideration of the question (see what is said by Pollock, C. B., in *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177), the

rule for estimating the damages for the breach of such contracts was stated to be that they should be such as may be fairly and reasonably considered as arising naturally; i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of its breach; and that if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from its breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of the contract under these special circumstances so known and communicated. But that, on the other hand, if these special circumstances were unknown to the party breaking the contract, he, at most, could be supposed to have had in his contemplation only the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, and could be held liable only to that extent for the breach of the contract. It was therefore held that the loss of profits claimed by the plaintiffs could not be reasonably consid-

ered such a consequence of the breach of the contract as could have been fairly and reasonably contemplated by both parties when they made the contract for the carriage of the shaft. For such loss would neither have flowed naturally from the breach of the contract, in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances communicated to or known to the defendants.

In *The Great Western Railway v. Redmayne*, L. R. 1 C. P. 329, the plaintiff had sent goods from Manchester, by the company's railway, to his traveler at Cardiff. Through the negligence of the company the goods were delayed until the traveler had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have made by a sale at Cardiff. No notice had been given to the company of the object for which the goods were sent. The county court judge having included in the damages the profits which the plaintiff would probably have made by the sale of the goods at Cardiff, his decision was reversed on appeal, the court holding that the market value of the goods was their value in the market independently of any circumstances peculiar to the plaintiff, and that the profits that would have been made by the sale of the goods at Cardiff, through the plaintiff's traveler being present, could not be recovered.

In *Woodger v. The Railway Co.*, L. R. 2 C. P. 318, a commercial traveler delivered a parcel of samples to the carrier to be delivered to A., but did not state the con-

tents of the parcel or the purpose for which it was required. By the negligence of the carrier the parcel was delayed, and the traveler spent three days at A. unemployed waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveler during the time he was waiting for the parcel were claimed as damages, it was held that such damages were too remote, and could not be recovered. "In this case," said Bovill, C. J., "a parcel was booked at Oxford to be conveyed to Liverpool. No intimation was given of the object with which it was sent or the purposes for which it was required. It is difficult to see how, under these circumstances, any such damages as the plaintiff's hotel expenses could have been reasonably within the contemplation of the parties; and I think, therefore, that the learned judge was perfectly correct in his ruling. It is true that in *Black v. Baxendale*, 1 Exch. 410, it was left to the jury whether the plaintiff was entitled to damages of a similar description, and the court held that it might be so left, but that the jury were wrong in the amount that they found. That case was, however, decided seven years before the rule was laid down in *Hadley v. Baxendale*, 9 Exch. 341, which has since been always acted on, that only such damages can be recovered for the breach of a contract as were reasonably within the contemplation of the parties at the time the contract was made. The last case on the subject is *Great Western Railway Company v. Redmayne*, L. R. 1 C. P. 329, in which it was held that the loss of profit by reason

of the plaintiff, a commercial traveler, having left the town before the goods arrived, could not be recovered; and such profit would seem to be more naturally within the contemplation of the parties than hotel expenses; and that case, therefore, seems to me a strong authority against the plaintiff."

In *Horne v. The Railway*, L. R. 8 C. P. 131, the plaintiffs, being shoe manufacturers, were under contract to supply a quantity of military shoes to a firm in London, for the use of the French army, at an unusually high price. The shoes were to be delivered by the 3d of February, and were accordingly sent to the company's station in time to be carried to London and there delivered in time, when they would have been accepted and paid for by the consignees. Notice was at the same time given to the agent of the company that the plaintiffs were under contract to deliver the shoes by the 3d of the month, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything otherwise exceptional in the contract. By the negligent delay of the company the shoes did not arrive in London until the 4th, when they were refused by the consignees, and the plaintiffs, being obliged to sell them at a price far below that which they would have received for them had they been delivered in time, brought their action against the carrier for the loss. The sole question seemed to be, in the consideration of the judges, whether the case came within the principle that the dam-

ages for a breach of a contract must be such as may fairly and reasonably be considered as arising from its breach, and might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of it. Upon this question the judges differed; but a majority of them agreed with Kelly, C. B., that it not being shown that the market value of the shoes had varied between the time when the shoes should have been delivered and that at which they were actually delivered, and there having been no notice to the company at the time of the shipment of the exceptional nature of the contract, the plaintiffs were entitled to only nominal damages.

In *Simpson v. The Railway*, L. R. 1 Q. B. Div. 274, the plaintiff, a manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them to the railway to be carried to a show ground, there to be exhibited as usual, under circumstances from which the agents of the road must have known his purpose. The samples not having arrived until the show was over, the plaintiff brought an action against the company for damages for loss of time and profit and recovered. Upon a rule *nisi* to set aside the verdict it was held to be right. "The law," said Cockburn, C. J., "as it is to be found in the reported cases has fluctuated; but the principle is now settled, that whenever either the object of the sender is specially brought to the notice of the carrier, or circum-

as the well settled rule, that special damages can be recovered from the carrier when the transportation has been delayed, only where it is shown that the shipper informed the carrier, at the time the contract was made, of the special circumstances requiring expedition in the shipment.³⁴ And although the carrier

stances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

These cases, with a number decided upon the same principle upon this side of the Atlantic (*Griffin v. Colver*, 16 N. Y. 489; *Copper Co. v. Copper Mining Co.*, 33 Vt. 92; *Deming v. The Railroad*, *supra*; *Scott v. The Steamship Co.*, 106 Mass. 468; *Blanchard v. Ely*, 21 Wend. 342; *Hamilton v. McPherson*, 28 N. Y. 72; *Krom v. Levy*, 48 *id.* 679; *Crater v. Binninger*, 4 Vroom, 513; *Richardson v. Chynoweth*, 26 Wis. 656; *Abbott v. Gatch*, 13 Md. 314; *Ashe v. De Rossett*, 5 Jones (N. C.), 299; *Meade v. Rutledge*, 11 Tex. 44; *Fessler v. Love*, 43 Penn. St. 313), have firmly established the rule that in order to hold the carrier for damages beyond those which would accrue from his negligent delay, "naturally and in the due course of things," he must be informed of the special circumstances which make promptness on his part important to the shipper, and which may occasion exceptional damages as the result of his delay; and consequently cases such as *Black v. Baxendale*, 1 Exch. 410, and *Toledo, etc., R. R. v. Lockhart*, 71 Ill. 627, in which the plaintiffs were allowed profits

lost and expenses unexpectedly incurred in consequence of the carrier's delay, when the latter was not informed of the purpose of the shipment or of the circumstances which made a prompt delivery by him necessary, may be considered as contrary to the established rule. See, also, *Harvey v. Railroad Co.*, 124 Mass. 421; *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390.

But as said by Wilde, B., in *Gee v. The Railway*, 30 L. J. Exch. 11, "this question of the measure of damages is one that has produced more difficulty than perhaps any branch of the law; and I rather agree with an observation made by my brother Martin, that although a very excellent attempt was made in *Hadley v. Baxendale* to lay down a rule of practice, it has been found that the rule will not meet all cases, and it will probably be found practically, when the matter comes to be more solemnly discussed, that in this, as in many other cases of contract, there is no measure of damages at all, and that we are seeking to find a rule when a rule cannot be made." s. c. 6 H. & N. 211.

34. *Bradley v. The Railway*, 94 Wis. 44, 68 N. W. Rep. 410; *Missouri, etc., Ry. Co. v. Belcher*, 89 Tex. 428, 35 S. W. Rep. 6; *Missouri, etc., Ry. Co. v. Sproles & Vines*, — Tex. Civ. App. —, 92 S. W. Rep. 40; *Chicago, etc., Ry. Co. v. Calvert*, — Tex. Civ. App. —, 91 S. W. Rep. 825; *Choc-*

may have been notified of such special circumstances in time to have prevented a delay, if such notice was given after the contract of transportation had been entered upon, it would not operate to modify the contract, or subject the carrier to liability for special damages arising from a subsequent delay.³⁵ The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be both alleged and proved.³⁶

Sec. 1368. Same subject—Notice given after contract to carry has been performed.—It has already been seen that even though the carrier, after the contract for carriage has been made, is informed of the special circumstances requiring expedition in the shipment in time to prevent a delay, such notice cannot subject him to liability for special damages arising from a subsequent delay; and the reason for this rule is said to be that such a notice, if allowed to be made the basis of special damages, would impose an additional liability upon the carrier, resulting from the contract itself, not contemplated by the parties when the contract was made. Where, however, notice of such circumstances as will occasion special damages is given the carrier after the contract to carry has been performed, and after the goods have accordingly arrived at their destination and are ready to be delivered, he will be liable

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| <p>taw, etc., Ry. Co. v. Rolfe, — Ark. —, 88 S. W. Rep. 870; Ill. Cent. R. Co. v. Mossbarger, — Ky. —, 91 S. W. Rep. 1121; Choctaw, etc., R. Co. v. Jacobs, — Okl. —, 82 Pac. Rep. 502; Guess & Glover v. Railway Co., — S. Car. —, 53 S. E. Rep. 421; Wehman v. Railway Co., — S. Car. —, 54 S. E. Rep. 360.</p> <p>35. Bradley v. The Railway, 94 Wis. 44, 68 N. W. Rep. 410; Ill. Cent. R. Co. v. Johnson & Fleming, — Tenn. —, 94 S. W. Rep. 600.</p> <p>36. Central Trust Co. v. Railroad Co., 69 Fed. 683; Railway Co. v.</p> | <p>Hall, 66 Fed. 868, 14 C. C. A. 153, 32 U. S. App. 60; Bradley v. Railway Co., 94 Wis. 44, 68 N. W. Rep. 410; Wabash, etc., Ry. Co. v. Lynch, 12 Ill. App. 365; Gulf, etc., Ry. Co. v. Cole (Tex.), 16 S. W. Rep. 176; Murrell v. Express Co., 54 Ark. 22, 14 S. W. Rep. 1098; Chicago, etc., Ry. Co. v. Hale, 83 Ill. 360; 1 Chitty on Pl. 348; De Forest v. Leete, 16 Johns. 122; Vicksburg, etc., R. R. v. Ragsdale, <i>supra</i>; Lindley v. Dempsey, 45 Ind. 246; Olmstead v. Burke, 25 Ill. 86; Furlong v. Poleys, 30 Me. 491.</p> |
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for such special damages if he negligently fails to make a delivery of the goods.³⁷ Thus where the plaintiff, after a shipment of cotton-seed cakes intended for feeding cattle had arrived at its destination, informed the carrier's agent of the special circumstances requiring expedition in the shipment, and the carrier, after such notice, negligently sent the cakes out on another road whereby they were not delivered to the plaintiff until a month later, it was held that the rule announced in the case of *Hadley v. Baxendale*³⁸ did not apply, and that the carrier was liable for the special damages sustained. "All that remained to be done," said the court, "was to make delivery, and this it was then in the power of the carrier to do at once. It had no right to demand extra compensation for a transportation already performed for making delivery; nor had it the right to refuse or delay delivery because of the conditions of which it then received notice. No extra or unusual precautions were necessary for delivery, or, if they were, the defendant was, at the time, in as good a position to make them as it would have been had the notice been given when the contract was made. The simple fact is that it held so much of plaintiff's property of which he desired and was entitled to immediate possession for a special purpose, and for the lack of which defendant was then fully informed plaintiff was in danger of suffering the loss for which compensation is now sought, which loss could have been prevented by mere delivery of the property. In such a case, knowledge of these facts when the contract for transportation was made appears to us to be unessential. . . . The plaintiff's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithlessness of defendant's agent at a time when the probable consequences thereof were fully disclosed. There would, in our opinion, be manifest in-

37. *Bourland v. Railway Co.*, reversing (Tex. Civ. App.) 87 S. — Tex. —, 90 S. W. Rep. 483, W. Rep. 173.

38. 9 Exch. 341.

justice in requiring the plaintiff, rather than the defendant, to bear the loss arising from this fault of the agent.³⁹

Sec. 1369. (§ 773.) Damage for delay in transporting articles intended for use in business.—If an article is intended for use in business at destination, and the carrier unreasonably delays its transportation, the owner cannot recover for the loss of its use during the delay, or the profits which he would thereby have made if it had been seasonably delivered, unless he alleges and proves that the carrier, at the time the contract for its transportation was made, was informed of the special use to which it was to be put.⁴⁰ And proof that the carrier had knowledge of the general use to which the article was to be put will not be sufficient to charge him with liability for loss

39. *Bourland v. Railway Co.*, *supra*.

40. *Crutcher v. The Railroad*, — Ark. —, 85 S. W. Rep. 770; *Swift River Co. v. The Railroad*, 169 Mass. 326, 47 N. E. Rep. 1015, 61 Am. St. Rep. 288, 8 Am. & Eng. R. Cas. (N. S.) 512; *Traywick v. The Railway*, 71 S. Car. 82, 50 S. E. Rep. 549; *Railway Co. v. Harris*, 121 Ga. 707, 49 S. E. Rep. 703; *Katz v. The Railway*, 91 N. Y. Supp. 720; *Brown v. Weir*, 88 N. Y. Supp. 479, 95 App. Div. 78; *The Prussia*, 100 Fed. 484; *Port Blakely Mill Co. v. Sharkey*, 102 Fed. 259, 42 C. C. A. 329; *s. c.* 92 Fed. 425; *Railway Co. v. Belcher*, 89 Tex. 428, 35 S. W. Rep. 6; *Daube & Knapp v. The Railway* (Tex. Civ. App.), 86 S. W. Rep. 797; *Weston v. Railroad Co.*, — Mass. —, 76 N. E. Rep. 1050.

In an action against the carrier for the loss of a shipment of ice, damages cannot be recovered for the loss of fish for which the ice was intended in the absence of evidence that the carrier had knowl-

edge of the purpose for which the ice was to be used. *Lewark v. The Railroad*, 137 N. Car. 383, 49 S. E. Rep. 882.

An express company failed to deliver within a reasonable time a nurseryman's order-book. *Held*, that in the absence of notice to the company that it was necessary for him to have the order-book to enable him to deliver trees to his customers, the company was not liable for losses resulting from his inability to fill orders. *Wells, Fargo & Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. Rep. 353.

In an action for an injury to a jack while in transit, no recovery can be had for loss of profits in letting him to mares, where it is not *averred* and *proved* that the carrier was informed of the intended use. *Chicago, etc., Ry. Co. v. Hale*, 83 Ill. 360. But in *Mis-souri, etc., Ry. Co. v. Nevin*, 31 Kans. 385, proof that the carrier was informed that corn shipped was intended for seed was held admissible without special averment.

of its use or the profits which would thereby have been made.⁴¹ The special circumstances of the case requiring care or expedition must have been brought to his attention in such a way that his acceptance of the article, under the circumstances, could fairly be said to amount to an assumption of the risks which naturally and proximately would flow from his default.⁴² In

41. Notice by a manufacturer of a machine that he wishes to introduce his machine in the west, and the fact that the consignee is a manufacturing company, is not sufficient to charge the carrier with knowledge that the consignee intended to use the machine in its business. *Thomas, etc., Co. v. Railway Co.*, 62 Wis. 642.

See, also, *Harvey v. Railroad Co.*, 124 Mass. 421.

42. In *British Saw-mill Co. v. Nettleship*, L. R. 3 C. P. 499, the plaintiff delivered to the defendant's servants on a quay at Glasgow, for shipment on board the defendant's vessel which lay alongside, several cases containing machinery, which was intended for the erection of a saw-mill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandise." The defendant knew generally of what the shipment consisted. On the arrival of the vessel at her destination, one of the cases which contained machinery, without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost articles. *Held*, that the defendant was liable for the loss of the machinery, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board. *Held*, also, that the measure of damages for

the breach of contract was the cost of replacing the lost articles in Vancouver's Island, with interest at five per cent. upon the amount until judgment, by way of compensation for the delay.

In answer to a claim for a loss of profits caused by the delay, *Wiles, J.*, said:

"What, then, is the rule which ought to govern a case of this sort? I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost, and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default for the full profits they might have made by the use of the mill if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater

degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. The case of *Ogle v. Lord Lane*, Law Rep. 3 Q. B. 272, is not much to the purpose; the arrangement as to damages took place after breach. Several circumstances occur to one's mind in this case to show that there was no such knowledge on the defendant's part which would warrant the conclusion contended for by the plaintiffs. In the first place, the carrier did not know that the whole of the machinery would be useless if any portion of it failed to arrive, or what that particular part was. And that suggests another consideration. He did not know that the part which was lost could not be replaced without sending to England. And, applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all those consequences in the event of a breach. Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such

knowledge or not. Knowledge, in effect, can only be evidence of fraud, or of an understanding by both parties that the contract is based upon the circumstances which are communicated. That is indicated by Pothier in the passage referred to, and distinctly pointed out in the case of the canon. And that, no doubt, is what was intended by the lord chief justice in *Cory v. Thames Ironworks Company*, Law Rep. 3 Q. B. 181. In conclusion, referring to the rule for the assessment of damages laid down in the case of collisions, see the vast field of inquiry which would be opened out, involving speculations of the wildest kind, if we were to take into consideration the plaintiffs' intention to erect a mill, and to set up for the first time a trade, the probable profits of which are wholly incapable of calculation or approximation. It would be making a guess, in order to impose upon the carrier for the mere breach of a contract, an extent of liability which we should decline to fix even upon a wrong-doer. Take the case of a barrister on his way to practice at the Calcutta bar, where he may have a large number of briefs awaiting him; through the default of the Peninsular & Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustains great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveler was going? I entirely agree with my lord that the plaintiffs cannot recover damages beyond the sum necessarily expended in replacing the lost box of machinery, and the freight and interest upon the

a well considered case⁴³ in the supreme court of Mississippi, in which the complaint was that the carrier had unreasonably and inexcusably delayed in the transportation of a boiler, part of the machinery of a saw-mill, for the want of which the mill was stopped, and its profits were lost, the following propositions were stated by Simrall, J., as well settled: 1st, that in actions for damages for breach of contract of that character, "the proximate and natural consequences of the breach must always be considered; 2d, such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into; 44 3d, damages, which fairly may be supposed not to have been the necessary and natural sequence of the breach, shall not be recovered, unless by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties; 45 4th, losses of profits in a business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself, or by explanation of the circumstances at the time the contract was made, that such dam-

amount for the time the plaintiffs were delayed."

See, also, the cases cited in the preceding section.

43. *Vicksburg & Meridian Railroad v. Raggsdale*, 46 Miss. 458.

And to support these propositions, the learned judge cited *Hadley v. Baxendale*, 9 Exch. 341; *Griffen v. Colver*, 16 N. Y. 489; *Masterson v. Mayor of Brooklyn*, 7 Hill, 61; *Abbott v. Gatch*, 13 Md. 314; *Hamilton v. McPherson*, 28 N. Y. 72; *Palm v. The Railroad*, 18 Ill. 217; *Ashe v. De Rossett*, 5 Jones (N. C.), 299; *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177; *Gee v. The Railway*, 6 Hurl. & N. 211; *Great Western Ry. v. Redmayne*, L. R. 1 C. P. 329; *Mc-*

Knight v. Ratcliffe, 44 Penn. St. 156; *Cooper v. Young*, 22 Ga. 269; *Priestly v. The Railroad*, 26 Ill. 205; *Green v. Mann*, 11 *id.* 613; *Sedg. on Dam.* 76, 77.

44. Thus, as an illustration of this rule, in *Savannah, etc., Ry. Co. v. Pritchard*, 77 Ga. 412, where a still-worm had been delayed, the consignee was held entitled to recover the value of crude turpentine which overflowed the boxes made to catch it and was lost, the owners having no barrels in which to store, and not being able to use it, as their mill could not be operated without the still-worm. The case was put upon the decision in *Hadley v. Baxendale*, *supra*.

45. See *Brown v. Weir*, 88 N. Y.

ages would ensue from non-performance;⁴⁶ 5th, if the contract is made with reference to embarking in a new business (such as sawing lumber for the market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damages; these are dependent largely upon other contingencies, skill, industry, energy, the market supply of material, keeping machinery in order, loss of time by weather, or breakage of machinery; 6th, if the delay is in the transportation of machinery to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means, the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time;⁴⁷ 7th, the party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him."⁴⁸

Sec. 1370. (§ 774.) Damages when carrier refuses to perform his contract to accept and carry the goods.—When the carrier enters into a contract to transport the goods, and afterwards refuses to accept or to convey them, it has been held that the true measure of damages to which the owner of the goods is entitled is the difference between the market value at the destination to which they were to have been carried, at the

Supp. 479, 95 App. Div. 78; *De Leon v. McKernan*, 54 N. Y. Supp. 167, 25 Misc. Rep. 182.

46. See *Katz v. The Railway*, 91 N. Y. Supp. 720; *Leach v. The Railroad*, 89 Hun, 379, 35 N. Y. Supp. 305.

47. Knowledge of the special use is indispensable. *Pacific Exp. Co. v. Darnell*, 62 Tex. 639, as that the articles were intended for a

mill which would be idle without them. Damages for loss to owner's business by delay in delivering goods are not recoverable when the carrier knew nothing about the circumstances when the goods were accepted for carriage. *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390.

48. See *Brown v. Weir*, *supra*.

time when they would have arrived there if the carrier had performed his contract, and their value at the same time at the place from which they were to have been carried, less the freight.⁴⁹ But if the owner of the goods can procure other means of conveyance it would be his duty to do so, and, in that case, the carrier could not only be charged with any excess in the cost of the shipment above the price for which, according to his contract, he was to have carried them, and such loss occasioned by the delay, if any, as might be its reasonable and natural consequence, or as he must know from the circumstances or from the information given him by the owner of the goods would be the result of his breach of the contract.⁵⁰ If, however, the carrier should demand of the owner of the goods a higher rate of freight than that to which they have previously agreed, and the rate demanded is not unreasonable, the owner cannot, on account of the higher rate demanded, refuse to ship the goods and thereby subject the carrier to liability for loss of profits arising from his inability to perform certain collateral contracts; although the carrier may have been informed of the nature and terms of such contracts. The duty of the

49. *Bridgman v. Steamboat Emily*, 18 Iowa, 509; *Bracket v. McNair*, 14 Johns. 170; *McGovern v. Lewis*, 56 Penn. St. 231; *Amory v. McGregor*, 15 Johns. 24; *O'Connor v. Forster*, 10 Watts, 418; *Bell v. Cunningham*, 3 Pet. 69; *The Cassius*, 2 Story, 81; *Cowley v. Davidson*, 13 Minn. 92; *Railway Co. v. Witherspoon* (Tex. Civ. App.), 38 S. W. Rep. 833, citing *Hutchinson on Carr.*; *Inman v. The Railroad*, 14 Tex. Civ. App. 39, 37 S. W. Rep. 37, citing *Hutchinson on Carr.*; *International, etc., R. Co. v. Startz* (Tex. Civ. App.), 33 S. W. Rep. 575.

Where the carrier fails to furnish cars as he agreed, knowing that they were wanted to carry goods in time for a certain mar-

ket day, the loss of that market is recoverable. *Hamilton v. Railroad Co.*, 96 N. C. 398. See, also, *Toledo, etc., Ry. Co. v. Roberts*, 71 Ill. 540. And where the carrier fails to furnish cars for the carriage of live stock within a reasonable time after demand has been made, the expense arising from the holding of the stock while waiting for the cars will be a proper element of damage. *Texas, etc., Ry. Co. v. Smith & White* (Tex. Civ. App.), 79 S. W. App. 614.

50. *Ogden v. Marshall*, 8 N. Y. 340; *The Tribune*, 3 Sumn. 144; *The Zenobia*, Abbott's Adm. 48; *Porter v. Steamboat New England*, 17 Me. 290; *O'Connor v. Foster*, *supra*; *Crouch v. The Railway*, 11

owner, under such circumstances, would be to ship the goods and pay the rate demanded, and he would then be entitled to sue and recover the difference between the rate charged and that agreed upon in the contract.⁵¹

The question of the right to recover damages for the failure to accept and carry goods intended for a special use, and for the loss of profits resulting from such failure, depends upon the same considerations as those already referred to in actions for damages caused by the carrier's delay.⁵²

Exch. 742; *Oakes v. Richardson*, 2 Lowell's Dec. 173; *Grund v. Pendergast*, 58 Barb. 216.

In *Houston, etc., Ry. Co. v. Smith*, 63 Tex. 322, it is held that when a railroad company wrongfully refuses to take produce offered for shipment, it is the duty of the owner to take care of and protect his property while it is delayed, and for the expense thus incurred the company is liable. It is also liable for the loss occasioned by the delay in getting the produce to its destination, to be estimated by ascertaining the price there, when it should have arrived, had it been taken when offered, and its price at the time it did arrive.

51. *Steffen v. The Railway*, 156 Mo. 322, 56 S. W. Rep. 1125.

52. See *ante*, §§ 1367, 1369.

In *Harvey v. Railroad Co.*, 124 Mass. 421, plaintiff made a contract with defendant for transportation from time to time as offered, of certain railroad ties from Canada to Boston, telling the company that he wished to make this contract because he expected to make contracts for the sale of the ties to other persons in Boston. He notified defendant that he had made such contracts and demanded transportation of ties

to fill these contracts, but defendant refused to transport them. He brought an action to recover for the loss of profits on these contracts, and recovered in the court below, but the verdict was set aside by the supreme judicial court. Said the court, by Endicott, J.:

"As the plaintiff had made no contracts for the delivery of ties in Boston at the time when the defendant entered into the agreement to transport, and no notice was or could then have been given of the character and terms of those contracts, we are of opinion that the defendant cannot be held liable in damages for the profits which would have accrued to the plaintiff under such subsequent contracts. Such damages could not have been in the contemplation of the parties, when they made their contract, as a probable result of a breach of it.

"When a carrier receives goods for transportation, and fails to deliver them, the owner is entitled to recover the market value of the goods at the time and place at which they should have been delivered. *Spring v. Haskell*, 4 Allen, 112. And where the carrier negligently delays the delivery of goods, he is liable for loss in their

Sec. 1371. (§ 774a.) Same subject.—But the right, where the carrier refuses to accept the goods, to transport them by other means and then to charge the delinquent carrier with the excessive cost is a limited one, depending upon the nature of

market value during the delay. *Cutting v. Grand Trunk Railway*, 13 Allen, 381. It is said in that case that this is the most simple and just rule as well as the easiest to be applied; for it depends on the general market value of the goods, and involves no question of contingent or speculative profits, and no consideration of any other contracts made or omitted to be made by the plaintiff in view of his contract with the defendant. To refer to such other contracts, or the profits which might have resulted from them, not within the knowledge or contemplation of the defendant, would be to hold him liable for the consequences, or allow him the benefit, not of his own contract with the plaintiff, but of dealings between the latter and third persons, with which the defendant had nothing to do.

“If, therefore, the defendant had received the ties for transportation according to its contract, and failed to deliver them at all, it would have been liable for their market value in Boston at the time when they should have been delivered; or, if it had negligently delayed the delivery, it would have been liable for the diminution in their market value during the delay. It would not, in either event, have been liable in damages for loss of profits sustained by the plaintiff under his subsequent contracts with other parties; unless it can be said that, by reason of the plaintiff’s announce-

ment that he intended to make such contracts, it was necessarily within the contemplation of the parties when they made the contract of transportation, and as the probable consequence of its breach, that the defendant might be liable for damages resulting to the plaintiff from his inability to fulfill such contracts, the terms of which were not and could not then be disclosed.

“The damages for which a carrier is liable for failure to perform his contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation, and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond, in a case of breach, for special and exceptional damages. In such a case the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose a liability upon the defendant for loss of profits on such contracts. Whether there would be a loss of profits, it was, of course, then impossible to determine, and probable profits would be incapable of estimation. If the defendant is liable in this

the goods and the circumstances of the case. For while such increased expense, if reasonable in amount, may form in many cases a proper element of damage,¹ there are other cases, as where the goods are mere merchandise sought to be shipped to a better market, in which it will not be. Thus in a leading case,² it appeared that one Elkins had made a contract with a lake carrier to transport a large quantity of salt from Bay City to Chicago. The carrier transported but one cargo, and Elkins claimed that he was then unable to get any other vessel to complete the carriage owing to the lateness of the season. He therefore had it sent by rail, in lots as he wanted it, from

case for such possible or probable profits, then every carrier who is informed, when he takes goods for transportation, that the shipper intends to sell them, is liable, upon failure to perform his contract, for loss to the shipper in his dealing with other parties, with which the carrier has nothing to do, and the result of which it is impossible for him to anticipate. *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468. This would be to introduce a new and uncertain element of liability into the contract, and we are not aware of any authority which goes to that extent. . . .

"This question has been considered in numerous cases, and it is sufficient to say that the principle upon which *Hadley v. Baxendale* was decided is now well established, though some of the *dicta* of Baron Anderson, in delivering the judgment, have been the subject of criticism. *Horne v. Midland Railway*, L. R. 8 C. P. 131, 133, 141; *Gee v. Lancashire & Yorkshire Railway*, 6 H. & N. 211; *Berries v. Hutchinson*, 18 C. B. (N. S.) 445; *Great Western Rail-*

way v. Redmayne, L. R. 1 C. P. 329; *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 177, 184, 186; *Woodger v. Great Western Railway*, L. R. 2 C. P. 318; *British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499; *Cory v. Thames Ironworks*, L. R. 3 Q. B. 181. See, also, *Waters v. Towers*, 8 Exch. 401, and Baron Parke's observation thereon in *Hadley v. Baxendale*, 9 Exch. 349.

"We are therefore of opinion there was error in instructing the jury that the plaintiff could recover damages for loss of profits on his subsequent contracts. As the ties were not sent to Boston, the true measure of damages is the difference between the market price in Boston and the market price in Canada at the time when the defendant should have transported the ties according to its contract, deducting therefrom the price stipulated in the contract for transportation."

1. *Crouch v. The Railway*, 11 Exch. 742.

2. *Ward's Line v. Elkins*, 34 Mich. 439.

time to time during several months, and, having brought an action, was permitted by the trial court to recover the difference between the price agreed upon and what he paid for transportation by rail.

But the supreme court, per Campbell, J., said: "We do not see upon what rule this recovery can be justified. The damages to which Elkins was entitled, if any, would be such as would have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such. The only advantage he could have gained by a timely shipment according to the contract would have been the excess of the value of the salt in the Chicago market, at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more.

"He would not have been justified in procuring shipment by rail if the railroad prices would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found on the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account.³ When such a necessity exists, it is maintained only as a necessity, and allowed because of its urgency. If such a rule is ever applicable, it cannot be satisfied by allowing a party, instead of seeking other means of carriage immediately

3. Citing *La Blanche v. The Railway*, L. R. 1 C. P. Div. 286.

at hand, to await his leisure and speculate on future chances, and make shipments piecemeal, as was done here.”

Sec. 1372. (§ 775.) Delay not a conversion of the goods—Nor loss through mere non-feasance.—Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay.⁴ And a voluntary acceptance of the goods, when there has been an inexcusable delay on the part of the carrier in their delivery, will not preclude the owner from a recovery of whatever damages he may have sustained thereby.⁵ Nor will the carrier be guilty of a conversion of the goods where a delivery of them was refused by an agent because of his understanding that they could be held for demurrage charges, where such agent at once

4. *St. Louis, etc., Ry. Co. v. Mudford*, 44 Ark. 439; *Scovill v. Griffith*, 12 N. Y. 509; *Hawkins v. Hoffman*, 6 Hill, 586; *Packard v. Getman*, 4 Wend. 613; *Robinson v. Austin*, 2 Gray, 564. See, also, *Gulf, etc., Ry. Co. v. Booton (Tex.)*, 15 S. W. Rep. 502; *Gulf, etc., Ry. Co. v. Jackson*, 4 Tex. Civ. App. 74, 15 S. W. Rep. 128; *Gulf, etc., Ry. Co. v. Everett (Tex. Civ. App.)*, 83 S. W. Rep. 257; *St. Louis, etc., Ry. Co. v. Tyler Coffin Co. (Tex. Civ. App.)*, 81 S. W. Rep. 826; *Gulf, etc., Ry. Co. v. Darby*, 28 Tex. Civ. App. 229, 67 S. W. Rep. 129; *Baumbach v. The Railway Co.*, 4 Tex. Civ. App. 650, 23 S. W. Rep. 693; *Herf, etc., Chemical Co. v. The Railroad*, 100 Mo. App. 164, 73 S. W. Rep. 346; *Spalding v. The Railroad*, 101 Mo. App. 225, 73 S. W. Rep. 274; *Redmon v. The Railroad*, 90 Mo. App. 68; *Baumann v. The Railroad*, 71

N. Y. Supp. 632, 35 Misc. 223; *The Hattie Palmer*, 68 Fed. 380, 15 C. C. A. 479, 35 U. S. App. 369; s. c. 63 Fed. 1015; *Railroad Co. v. House*, 101 Ill. App. 397; *Railway Co. v. Heilprin*, 95 Ill. App. 402; *Wells, Fargo, etc., Co. v. Hanson*, — Tex. Civ. App. —, 91 S. W. Rep. 321, citing *Hutch. on Carr.*; *Clark v. Am. Ex. Co.*, — Iowa, —, 106 N. W. Rep. 642; Ill. Cent. R. Co. *v. Johnson & Fleming*, — Tenn. —, 94 S. W. Rep. 600.

If the carrier, on demand, refuses to deliver a trunk within a reasonable time because it is lost, but it is later found and tendered to the plaintiff, the carrier is not guilty of a conversion. *Wells, Fargo, etc., Co. v. Hanson*, *supra*.

5. *Hackett v. The Railroad*, 35 N. H. 390; *Ryland & Rankin v. The Railway*, 55 W. Va. 181, 46 S. E. Rep. 923, citing *Hutchinson on Carr.*

conferred with his superior who instructed the agent to deliver the goods, and such instruction was communicated to the owner before suit was brought.⁶ So a theft or loss of the goods through the mere non-feasance of the carrier will not render him liable in an action for their conversion.⁷

Sec. 1373. (§ 776.) Damages for delay where the goods are not for sale as merchandise.—Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, the rule that the carrier will be liable for depreciation in the market value during his negligent delay will, of course, not be applicable; and in the absence of special circumstances which may make the carrier liable for some special loss, or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the time of the delay; which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of its use, the criterion of which would be, in most cases, its rental value during the delay; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the article by another conveyance or from some other source.⁸

Sec. 1374. (§ 776a.) Measure of damages for conversion of the goods—Mitigation of damages.—The measure of damages for the conversion of the goods will ordinarily be the same as for their loss or destruction, namely, their value at the place of

6. *Stahl v. The Railroad*, 71 N. 206; *Texas, etc., Ry. Co. v. Hassell*, 23 Tex. Civ. App. 681, 58 S. H. 57, 51 Atl. Rep. 176.

7. *Wamsley v. Steamship Co.*, 168 N. Y. 533, 61 N. E. Rep. 896, 85 Am. St. Rep. 699, *reversing s. c.* 63 N. Y. Supp. 761, 50 App. Div. 199; *s. c.* 56 N. Y. Supp. 284, 37 App. Div. 553.

8. *Benton v. Fay*, 64 Ill. 417; *Priestly v. The Railroad*, 26 Ill. 205; *Green v. Williams*, 45 Ill. 487.

destination, with interest, less the cost of transportation.⁹ An unqualified refusal to deliver the goods, or a refusal based upon an unreasonable requirement, is a conversion;¹⁰ and where there is a question as to the amount of damages sustained by the refusal, it is held that the plaintiff is not bound to accept a subsequent tender of them, but may recover their value.¹¹ But though a delivery of the goods to the wrong person is a conversion,¹² yet, where the carrier discovers it and reclaims the goods so that he has them in readiness to be delivered, it is held that this may be shown in mitigation of damages.¹³ So, where the goods have been delivered by the carrier without the owner's consent, but the person to whom they are so delivered afterwards pays the owner for them, this fact may be shown in mitigation.¹⁴ Where the carrier delays delivery in good faith and upon reasonable grounds, in order to ascertain the person entitled to receive the goods, he will not be liable;¹⁵ but even if the delay was not authorized, he will not be liable for loss to the owner's business when the special circumstances upon which it is based were not disclosed to the carrier at the time he accepted the goods.¹⁶

Sec. 1375. Damages for injury to, or delay in the shipment of bodies of deceased persons.—The question whether the carrier is liable in damages for an injury to the body of a deceased person which he has undertaken to carry came before the supreme court of Georgia in the case of *The Railroad Co. v. Wilson*,¹⁷ which was an action by a widow to recover damages for an injury to the body of her deceased husband, and it was

9. See *ante*, § 1360; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476, 34 Am. St. Rep. 579, 21 L. R. A. 117; *Downing v. Outerbridge*, 79 Fed. 931, 25 C. C. A. 244; *Missouri, etc., Ry. Co. v. Rines* (Tex. Civ. App.), 84 S. W. Rep. 1092; *Carter & Corey v. Railway Co.*, — Tex. Civ. App. —, 93 S. W. Rep. 681.

10. See *ante*, § 651.

11. *Loeffler v. Packet Co.*, 7 Mo. App. 185.

12. *Ante*, § 669, *et seq.*

13. *American Express Co. v. Brunswick*, 4 Ill. App. 606.

14. *Jellett v. The Railway*, 30 Minn. 265.

15. *Ante*, § 668.

16. *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390.

17. 123 Ga. 62, 51 S. E. Rep. 24.

there held that a widow has such an interest in the body of her deceased husband as to entitle her to maintain an action for an injury inflicted upon it, and that an allegation that the carrier to whom she delivered the body permitted the coffin and body to remain upon a station platform for several hours during a heavy rain storm, whereby the body was soaked and otherwise mutilated, stated a cause of action. And where a wife has suffered distress of mind because of the carrier's negligent delay in the transportation of the body of her deceased husband,¹⁸ or a father has been subjected to mental suffering because of an unreasonable delay in the shipment of the body of his deceased son,¹⁹ the carrier will be liable in damages for the mental suffering thus occasioned. Such damages, it is said, rest upon the principle that damages naturally resulting from a wrongful act, and fairly within the contemplation of the parties, may be recovered.²⁰ Where, however, the contract for the transportation of the body of a deceased person was entered into with a person in no manner related to such person's family, and the existence of relatives of the deceased person was not disclosed to the carrier, it was held that, in the absence of proof of such a disclosure, damages for mental anguish suffered by the relatives in consequence of a negligent delay in shipment were not recoverable, since they were not fairly within the contemplation of the carrier as a probable consequence of its breach of contract.²¹

18. *Hale v. Bonner*, 82 Tex. 33, Law Rep. 375, 68 S. W. Rep. 433, 17 S. W. Rep. 605, 27 Am. St. Rep. 57 L. R. A. 771.
850, 14 L. R. A. 336.

21. *Nichols v. Eddy* (Tex. Civ. App.), 24 S. W. Rep. 316; *Express Co. v. Fuller*, 13 Tex. Civ. App. 610, 35 S. W. Rep. 824.
Co. v. Fuller, 4 Tex. Civ. App. 213, 23 S. W. Rep. 412.

20. *Railroad Co. v. Hull*, 24 Ky.

CHAPTER XV.

OF ACTIONS AGAINST CARRIERS FOR INJURIES TO PASSENGERS.

I. COMMON-LAW ACTIONS.

§ 1376. Actions for injuries at common law.

1377. Parent's right of action.

1378. Same subject—Nature and extent of recovery.

1379. Husband's right of action.

1380. Relation of servitude necessary at common law.

1381. Effect of child's contributory negligence on parent's action.

1382. Effect of parent's contributory negligence on his own action.

1383. Effect of negligence of husband or wife on the other's action.

II. STATUTORY ACTIONS.

1384. Statutory right of action in case of death.

1385. Same subject—Similar acts in the United States.

1386. Whether statute gives a new right of action.

1387. Extraterritorial effect of these statutes.

1388. When right of action created in one state may be prosecuted in other states.

1389. Who may sue under these statutes.

§1390. Who may sue when action is brought in state other than one where death is caused.

1391. Effect of deceased's contributory negligence or his settlement of the action.

1392. Effect of beneficiaries' contributory negligence or release.

1393. What law governs as to the effect of contributory negligence or of a release.

1394. When existence of kin must be shown.

1395. Who included among beneficiaries—Aliens — Posthumous and illegitimate children—Grandchildren.

1396. Effect of time limitation.

1397. Measure of damages.

1398. No damages for mental suffering of beneficiaries.

1399. Nominal damages.

1400. Punitive damages ordinarily not recoverable.

1401. Province of jury in allowing damages.

1402. Distribution of damages recovered.

III. OF ACTIONS IN GENERAL.

1. *The form of action.*

§1403. Form of action optional.

1404. Form of action when exemplary damages are claimed.

1405. Form when brought by personal representative.

1406. Recovery must be for cause of action stated.

1407. How form of action is determined.

1408. Same subject.

2. *The pleadings.*

1409. Special damages must be pleaded.

1410. Same subject.

3. *The evidence.*

1411. Proof of the carrier's negligence.

1412. Presumptions as to negligence.

1413. When the fact of the injury is *prima facie* evidence of negligence.

1414. Same subject.

1415. Proof of injury usually makes a *prima facie* case of negligence.

1416. Same subject—How where passenger agrees to assume risk of accident.

1417. Contributory negligence of passenger — Burden of proof on defendant.

1418. Same subject—Cases holding that burden of proof is on plaintiff.

1419. To defeat recovery plaintiff's negligence must have been a proximate cause of injury.

1420. How question of contributory negligence determined.

4. *The measure of damages.*

§1421. Measure of damages is generally compensation for injury.

1422. Compensation for pain and suffering.

1423. Future damages may be considered.

1424. Inconvenience may be considered.

1425. Suffering must be real.

1426. Measure of damages for delay in transporting the passenger.

1427. Damages for mental suffering.

1428. Damages must be proximate and natural consequence of the injury.

1429. Same subject—The more liberal rule.

1430. Same subject—How question determined.

1431. Passenger must seek to make his damage as light as possible.

1432. Effect of previous sickness or disease.

1433. Damages in case of maltreatment — Ejection from train.

1434. Same subject—How when maltreatment is provoked by insulting language or violent conduct of passenger.

1435. Exemplary or punitive damages against carriers.

1436. On what theory allowed.

1437. When allowed for carrier's neglect of duty in furnishing safe vehicles, tracks, etc.

1438. When exemplary damages allowed for reckless acts of carrier's servants.

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| <p>§1439. Same subject.</p> <p>1440. Same subject—The more liberal rule.</p> <p>1441. When allowed for active maltreatment of passenger.</p> <p>1442. Same subject—The more liberal rule.</p> | <p>§1443. Same subject—Effect of servant's good faith.</p> <p>1444. Same subject—Evidence of authority or ratification.</p> <p>1445. Same subject—Carrier only liable where servant would have been.</p> <p>1446. When carrier may disprove wrongful intent.</p> |
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I. COMMON-LAW ACTIONS.

Sec. 1376. (§ 777.) Actions for injuries at common law.—

By the common law the right of action for the personal injury sustained by the passenger through the negligence of the carrier was confined solely to him; and in case of his death without a recovery, the right did not survive nor pass to his personal representatives, but ceased with the termination of his life, according to the maxim *actio personalis moritur cum persona*.¹ But if it could be shown that the injured passenger stood in the relation of servant to the plaintiff, and that in consequence of the injury the plaintiff had sustained damage by the loss of the services of the servant, he was allowed to recover, not directly for the personal injury, but for the consequential pecuniary loss; and, in theory at least, his recovery was limited by the extent of this loss, the right of action for the injury to his person being in the injured party and ceasing to exist upon his death.²

Sec. 1377. (§ 778.) Parent's right of action.—Upon this principle the parent has a right of action for injury to his

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| <p>1. <i>Baker v. Bolton</i>, 1 Camp. 493; <i>Carey v. The Railroad</i>, 1 Cush. 475; <i>Kearney v. The Railroad</i>, 9 <i>id.</i> 109; <i>Whitford v. The Railroad</i>, 23 N. Y. 465; <i>Dickins v. The Railroad</i>, <i>id.</i> 158; <i>Ohio, etc., R. R. v. Tindall</i>, 13 Ind. 366; <i>Eden v. The Railroad</i>, 14 B. Mon. 204; <i>Green v. The Railroad</i>, 28 Barb. 9; <i>Hyatt v. Adams</i>, 16 Mich. 180; <i>Soule v. The Railroad</i>, 24 Conn. 575; <i>Louis-</i></p> | <p><i>ville, etc., R. R. v. Burke</i>, 6 Cold. 45; <i>Lyons v. Woodward</i>, 49 Me. 29; <i>Palfrey v. The Railroad</i>, 4 Allen, 55; <i>Hubgh v. The Railroad</i>, 6 La. Ann. 495; <i>Holland v. Railroad Co.</i>, 144 Mass. 425; <i>Chicago, etc., Ry. Co. v. Schroeder</i>, 18 Ill. App. 328; <i>Edgar v. Castello</i>, 14 S. C. 20.</p> <p>2. <i>Hall v. Hollander</i>, 4 B. & C. 660.</p> |
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minor child, who is regarded as under his dominion and in that sense as his servant; and consequently it has been held that his right of recovery will be limited by the actual consequential injury which he has sustained by the loss of the child's service. Such at least is understood to be the extent of his common-law right; and it is consequently held that the mere relation of parent and child of itself confers no right of action upon the former for an injury done to the latter, but that there must be evidence of service of which the parent has been deprived in consequence of the injury.³ Nor will it be sufficient evidence of service to show that, at the time of the death of his son, the parent was receiving for his support, under a contract between them, a portion of the son's monthly earnings.⁴

Sec. 1378. (§ 779.) Same subject—Nature and extent of recovery.—But in this country greater latitude has been allowed in the recovery by the parent, and it has been held that he may recover, not only for the loss of service, but for the expense of the sickness of the plaintiff's wife, caused by the shock to her feelings by the negligent killing of her son;⁵ for distress of mind occasioned by the child's death, and for the expenses of its funeral;⁶ and also for the expenses incurred by the parent in the curing or attempt to cure the child of its injuries;⁷ and this it would seem is the case without reference

3. *Hall v. Hollander*, 4 B. & C. reversing 24 N. Y. Supp. 142, 4 660; *Kennard v. Burton*, 25 Me. Misc. 401.
 39; *James v. Christy*, 18 Mo. 162; 4. *Brink v. The Railroad*, 160
Dunn v. Railway Co., 21 Mo. App. Mo. 87, 60 S. W. Rep. 1058, 83
 188; *Matthews v. Railway Co.*, 26 Am. St. Rep. 459.
 Mo. App. 75; *Grinnell v. Wells*, 5. *Ford v. Monroe*, 20 Wend. 210.
 7 M. & Gr. 1041; *Rogers v. Smith*, 6. *Owen v. Brockschmidt*, 54
 17 Ind. 323; *Hartfield v. Roper*, Mo. 285.
 21 Wend. 615; *Dennis v. Clark*, 2 7. *Dennis v. Clark*, 2 Cush. 347;
 Cush. 347. *Sawyer v. Sauer*, 10 Kan. 519;

In an action for the loss of service of the plaintiff's wife resulting from a miscarriage, no recovery can be had for the loss of the prospective offspring. *Butler v. The Railway*, 143 N. Y. 417, 38 N. E. Rep. 454, 26 L. R. A. 46, *Sykes v. Lawlor*, 49 Cal. 236; *Karr v. Parks*, 44 *id.* 46; *Durden v. Barnett*, 7 Ala. 169; *Penn. R. R. v. Kelley*, 31 Penn. St. 372; *Hussey v. Ryan*, 64 Md. 426; *Frick v. Railway Co.*, 75 Mo. 542; *Evan-sich v. Railway Co.*, 57 Tex. 123.

to the capacity of the child to render service to its parent.⁸ It has also been held that, in estimating the damages sustained by the parent, not only the loss up to the time of the trial might be considered, but all such prospective loss as must necessarily accrue from the injury;⁹ and that where injuries were maliciously inflicted, the parent might recover not only compensatory but even exemplary or punitive damages.¹⁰ But it seems that in estimating the value to the parent of the child's future services, the expenses of his support during minority should be considered.¹¹ This right of action is ordinarily the father's; but where the father is dead, the mother may recover for the loss of services of her unemancipated child and for the expense to which she is put for nursing and medical attendance.¹²

Sec. 1379. (§ 780.) Husband's right of action.—So, by the common law, the husband being entitled to the society as well as to the labor and earnings of the wife, and to all property acquired as the fruits of her labor, any injury done to her, either by design or by negligence, would, upon the same principle, be the subject of an action for damages by the husband, and he would be entitled to recover, not only for the loss of the services and society of his wife, but for any expenses incurred by him in consequence of the injury inflicted.¹³ And although

He may recover for his own time expended in nursing. *Whitaker v. Warren*, 60 N. H. 20. *Con-*
nell v. Putnam, 58 N. H. 534.

8. *Sykes v. Lawlor*, 49 Cal. 236. 304; *Magee v. Holland*, 3 Dutcher,
See *Karr v. Parks*, 44 Cal. 46; 86.

Sawyer v. Sauer, 10 Kan. 519. 11. *Telfer v. Railroad*, 1 Vroom,

9. *Drew v. The Railroad*, 26 N. 188.

Y. 49. Parent may recover for prospective loss during minority, 63 Miss. 38; *Hartford Co. v. Ham-*
and for expenses incurred in the ilton, 60 Md. 340. But she must
child's care and cure, but not for show that the child was in her
contingent prospective expenses of service. *Matthews v. Railway Co.*,
of this kind. *Cuming v. Railroad Co.*, 26 Mo. App. 75.
109 N. Y. 95.

Adopted parent may recover for Y. 47; *Sloan v. The Railroad*, 1
loss of services of a child received Hun, 540; *Brooks v. Schwerin*, 54
into his family and treated as his N. Y. 343.

the injury might result in the death of the wife, this would not deprive the husband of his right to recover for the loss which he had previously sustained. Her death could not extinguish a right of action which had previously existed.¹⁴ And the same rule would apply, of course, in case of the death of the servant or child.¹⁵ But where an injury is sustained by the wife, and, by statute, the fruits of her earning capacity belong to her, a deprivation of that capacity will be considered as her own individual loss, and the husband will be entitled to recover for the loss of only such services as are domestic in character.¹⁶ If, at the time of an injury to the wife, she is rendering voluntary service for her husband in his business, the husband may recover for the loss of such service.¹⁷

Sec. 1380. (§ 781.) Relation of servitude necessary at common law.—The right of one person to recover damages for an injury done to another exists, however, only when in fact or by construction of law that other is the servant of the former; and depends solely upon the relation of servitude and the loss of service.¹⁸ It therefore follows that no such right of action exists on behalf of the child, the servant, or the wife, for an injury done to the parent, the master or the husband, as the case may be, unless it be conferred by statute, however much the person standing in such dependent relation may have been the sufferer by the infliction of the injury; and whether the

Where husband and wife are both injured by the same act, his recovery for injuries to his person is no bar to his action to recover for loss of society and services of his wife, and for expenses in curing her. *Skoglund v. Railroad Co.*, 45 Minn. 330, 47 N. W. Rep. 1071, citing as analogous but conflicting cases, *Railroad Co. v. Chester*, 57 Ind. 297, and *Newbury v. Railroad Co.*, 25 Vt. 377.

The husband may recover the value of his services while acting

as a nurse for his wife. *Louisville, etc., R. Co. v. Quinn*, — Ala. —, 39 So. Rep. 616.

14. *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595.

15. *Ford v. Monroe*, 20 Wend. 210.

16. *Railway Co. v. Humble*, 181 U. S. 57; *s. c.* 97 Fed. 837, 38 C. C. A. 502; *Cullar v. The Railway*, 84 Mo. App. 340, 347.

17. *Georgia, etc., Co. v. Tice*, — Ga. —, 52 S. E. Rep. 916.

18. *Hall v. Holland*, 4 B. & C. 660.

injury resulted in the death of the party or not, no right to recompense or satisfaction from the wrong-doer accrued, by the rules of the common law, to any other person, by virtue of his relation to or dependence upon the person to whom the wrong had been done.¹⁹

Sec. 1381. (§ 781a.) Effect of child's contributory negligence on parent's action.—Where the father sues to recover for the loss of service and incidental damages consequent upon an injury to his child, his right of recovery is ordinarily subject to the defense of his child's contributory negligence where the latter is of such age that negligence will be attributed to him.²⁰ As is said in one case:²¹ "The father can recover only under the same circumstances of prudence as would be required if the action were on behalf of the boy."

But where, without the knowledge or consent of the father, the child is put by his employer at a dangerous occupation, it is held that the contributory negligence of the child will not be imputed to the father.²²

Sec. 1382. (§ 781b.) Effect of parent's contributory negligence on his own action.—So it is well settled that in an action by the parent for the loss sustained by himself from the injury to his child, the parent's own contributory negligence is a good defense to his action.²³

Sec. 1383. (§ 781c.) Effect of negligence of husband or wife on the other's action.—The effect of the negligence of either husband or wife in actions brought by the other is not clearly settled. The question is affected by two influences—one, the legal identity of the two and the right of the husband

19. At common law a child has no right of action for the death of his parent. The action is statutory or none. *Scott v. Railroad Co.*, 77 Ga. 450.

20. *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453; *Kennard v. Burton*, 25 Me. 39; *Burke v. Railroad Co.*, 34 How. Pr. 239; *Chicago, etc., R. Co. v. Harney*, 28 Ind. 28.

21. *Burke v. The Railroad*, *supra*.

22. *Williams v. The Railroad*, 91 Ala. 635, 9 So. Rep. 77.

23. *Iron Co. v. Brawley*, 83 Ala. 375; *Williams v. Railroad Co.*, 91 Ala. 635, 9 S. Rep. 77; *Hurst v. Railway Co.*, 84 Mich. 539; *Glassey v. Railway Co.*, 57 Penn. St. 172; *Railway Co. v. Snyder*, 24 Ohio St.

to the wife's personalty at common law; the other, the imputation of negligence, under the rule in *Thorogood v. Bryan*, both of which have been largely done away with in modern times by legislative enactments in the one case and judicial decisions in the other.

Where the action is brought by both for their joint benefit, the negligence of the wife is held attributable to the husband,²⁴ and in her action, where "she was under the care of her husband, who had the custody of her person and was responsible for her safety,"²⁵ his negligence is held to be a bar to her recovery. Where, however, the right to sue alone and recover as her sole property is given by statute to the wife,²⁶ or where the husband has no joint interest in the action and is in no way identified with her,²⁷ the rule may be otherwise.

In another class of cases, namely, that where the husband sues for the loss of services and society of his wife, as at common law, his contributory negligence or hers, as in the case of parent and child, or master and servant, would defeat his action.²⁸

II. STATUTORY ACTIONS.

Sec. 1384. (§ 782.) Statutory right of action in case of death—Lord Campbell's Act.—As has been seen,²⁹ no action could be maintained at common law to recover damages for injuries sustained by reason of causing the death of a human being.³⁰ This, which was long regarded as one of the imper-

670; *Wright v. Railroad*, 4 Allen, 231; *Hedges v. Kansas City*, 18 289; *Albertson v. Railroad Co.*, 48 Mo. App. 62.
Iowa, 292; *Galveston, etc., R. Co. v. Scott* (Tex. Civ. App.), 79 S. W. Rep. 642.

24. *McFadden v. The Railway*, 87 Cal. 464.

25. *Peck v. Railroad Co.*, 50 Conn. 379; *Carlisle v. Sheldon*, 38 Vt. 440. See, also, *Yahn v. Ottumwa*, 60 Iowa, 429; *Huntoon v. Trumbull*, 2 McCrary, 314.

26. *Flori v. St. Louis*, 3 Mo. App.

27. *Platz v. Cohoes*, 24 Hun, 101; *affirmed on other points*, 89 N. Y. 219.

28. See *ante*, §§1381, 1382.

29. *Ante*, § 1376.

30. *England*: *Baker v. Bolton*, 1 Campb. 493; *Osborn v. Gillett*, L. R. 8 Exch. 8.

Canada: *Monaghan v. Horn*, 7 S. C. R. (Can.) 409.

U. S.: *Insurance Co. v. Brame*, 95

fections of the law, was at length remedied by legislative enactment, conferring a right of action when death was the consequence of the injury and had put it out of the power of the

U. S. 754, 24 L. Ed. 580; *Swift & Co. v. Johnson*, — C. C. A. —, 14 B. Mon. 204.
138 Fed. 867.

Alabama: *Kahl v. Railroad Co.*, 95 Ala. 337.

Arizona: *Don Yan v. Ah You*,* 4 Ariz. 109, 77 Pac. Rep. 618.

California: *Kramer v. Railroad Co.*, 25 Cal. 434.

Colorado: *Kelley v. Railroad Co.*, 16 Colo. 455.

Connecticut: *Goodsell v. Railroad Co.*, 33 Conn. 51.

Delaware: *Kennedy v. Del. Cotton Co.* 4 Penne. 477, 58 Atl. Rep. 825.

D. of C.: *U. S. Electric Lighting Co. v. Sullivan*, 22 App. D. C. 115.

Florida: *Louisville, etc., R. R. Co. v. Jones*, — Fla. —, 34 So. Rep. 246.

Georgia: *Womack v. Railroad Co.*, 80 Ga. 132; *Western, etc., R. Co. v. Strong*, 52 Ga. 461.

Illinois: *Chicago, etc., Ry. Co. v. Schroeder*, 18 Ill. App. 328; *Maney v. Railroad Co.*, 49 Ill. App. 105; *Chicago, etc., R. R. Co. v. O'Donnell*, 114 Ill. App. 346.

Indiana: *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Stewart v. Railroad Co.*, 103 Ind. 14.

Iowa: *Seney v. Railway Co.*, 125 Iowa, 290, 101 N. W. Rep. 76; *Major v. Railway Co.*, 115 Iowa, 309, 88 N. W. Rep. 815; *Conners v. Railroad Co.*, 71 Iowa, 490, 60 Am. St. Rep. 814.

Kansas: *Eureka v. Merrifield*, 53 Kans. 794, 37 Pac. Rep. 113.

Kentucky: *Gregory v. Railroad Co.*, 26 Ky. L. Rep. 76, 80 S. W.

Rep. 795; *Eden v. Railroad Co.*, 14 B. Mon. 204.

Louisiana: *Hubgh v. Railroad Co.*, 6 La. Ann. 495, 54 Am. Dec. 465; *Van Amburgh v. Railroad Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.

Maine: *Bligh v. Railroad Co.*, 94 Me. 499, 48 Atl. Rep. 112.

Massachusetts: *Skinner v. Railroad Co.*, 1 Cush. 475.

Michigan: *Hyatt v. Adams*, 16 Mich. 180.

Mississippi: *Amos v. Railroad Co.*, 63 Miss. 511.

Missouri: *McNamara v. Slavens*, 76 Mo. 329; *Casey v. Transit Co.*, — Mo. App. —, 91 S. W. Rep. 419.

New Hampshire: *Corliss v. Railroad Co.*, 63 N. H. 404.

New Jersey: *Grosso v. Railroad Co.*, 50 N. J. L. 317; *Myers v. Holborn*, 58 N. J. L. 193, 33 Atl. Rep. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345.

New York: *Sorensen v. Balaban*, 42 N. Y. Supp. 654, 11 App. Div. 164; *Duncan v. St. Luke's Hospital*, — App. Div. —, 98 N. Y. Supp. 866.

North Dakota: *Harshman v. Railway Co.*, — N. Dak. —, 103 N. W. Rep. 412.

Ohio: *Worley v. Railway Co.*, 1 Handy, 481, 12 Ohio Dec. 247.

Oregon: *Schleiger v. Terminal Co.*, 43 Ore. 4, 72 Pac. Rep. 324.

Pennsylvania: *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.

South Carolina: *Edgar v. Castle*, 10, 14 S. C. 20, 37 Am. Rep. 714.

injured person himself to obtain redress for the wrong. This change was first effected in England by what is known as Lord

Tennessee: Louisville, etc., R. R. Co. v. Burke, 6 Coldw. 45.

Texas: Gulf, etc., Ry. Co. v. Beall, 91 Tex. 310, 42 S. W. Rep. 1054, 66 Am. St. Rep. 892, 41 L. R. A. 807.

Utah: Thomas v. Railroad Co., 1 Utah, 233.

Vermont: Sherman v. Johnson, 58 Vt. 40, 2 Atl. Rep. 707.

West Virginia: Shaw v. City of Charleston, — W. Va. —, 50 S. E. Rep. 527.

In *Grosso v. Railroad Co.*, 50 N. J. L. 317, Magie, J., says: "Many reasons have been suggested for the rule. It has been said that it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation (*Worley v. Cincinnati R. Co.*, 1 Handy, 481); that upon the principle which would allow an action to those who have been deprived of the services of deceased, an action would lie in favor of those entitled to the protection or interested in the life of deceased, as defendants or even creditors (*Connecticut Insurance Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265); that there is a natural and universal repugnance among enlightened nations in setting a price on human life (*Hyatt v. Adams*, 16 Mich. 180), and—which is perhaps as satisfactory as any—that the right to such services as are under discussion ceases at the instant of death, so that the husband or master is deprived of no service to which he can be said to have a right. Wood on Master

and Servant, § 223; Shearm. & Redf. on Negligence, § 290.

"What may have been the real reason for the establishment of this rule of the common law we may not be able to discover. But if so I do not apprehend we can apply the maxim '*Cessante ratione.*' In that case the rule must be held to be one (to use the apt illustration of Mr. Bishop) originally created for some legal reason which in the mutation of things has crumbled away, leaving the rule so crystallized as to be immovable except by legislative power. 1 Bish. Crim. L. § 337.

"It is in this sense, I think, that the rule has been accepted as law in this country. While several of our text-books criticise it, all seem to admit it to have been a rule of the common law generally adopted here Reeve on Domestic Relations, 377; Schouler on Domestic Relations, 110; Shearm. & Redf. on Negligence § 290; Wood on Master and Servant, § 223; 1 Thompson on Negligence, n. 1272; Hilliard on Torts, 87.

"There are two early cases in this country in which the common-law rule was not applied. The first one was *Smith v. Weaver*, Taylor, 58, in which an action for damages for the killing of a slave was allowed. The report is obscure, and it is obvious that some considerations growing out of the peculiar relations of master and slave may have afforded ground for the decision. The other case is that of *Ford v. Monroe*, 20

Wend. 210, where a father was permitted to recover for the loss of the services of his son, killed by the defendant. But the point was evidently not raised by counsel and passed *sub silentio*. That case, moreover, as well as the later case of *Lynch v. Davis*, 12 How. Pr. 323, were clearly overruled by the court of appeals in the case below cited.

"I have not found any other cases giving the least countenance to the contention of plaintiff in error until one of recent date hereafter referred to.

"On the contrary, we have the common-law rule forbidding an action for damages occasioned by the death of a human being, except in cases where a statute gives a remedy by action, acknowledged in Massachusetts (*Skinner v. Housatonic R. Co.*, 1 Cush. 475); in Kentucky (*Eden v. Lexington R. Co.*, 14 B. Mon. 204); in New York (*Green v. H. R. R. Co.*, 23 Barb. 9; *s. c.* 2 Keyes, 294); in Michigan (*Hyatt v. Adams*, 16 Mich. 180); in Indiana (*Long v. Morrison*, 14 Ind. 595; *Ind. P. & C. R. Co. v. Keely*, 23 Ind. 133); in Connecticut (*Connecticut Mutual Insurance Co. v. N. Y. & N. H. R. Co.*, 25 Conn. 272); in the supreme court of the United States (*Insurance Co. v. Brame*, 95 U. S. 754); in California (*Kramer v. San Francisco Street R. Co.*, 25 Cal. 434); in Maine (*Nickerson v. Harriman*, 38 Me. 277); in Pennsylvania (*Pennsylvania R. R. Co. v. Adams*, 55 Penn. St. 499); and in Georgia (*Selma R. Co. v. Lacy*, 49 Ga. 106).

"The case of recent date above referred to is *Sullivan v. Union Pacific R. Co.*, 3 Dillon, 334. The

action was by a parent for the loss of the services of his son, claimed to have been killed by the negligence of the defendant. It was admitted that there was no existing statute upon which the action could rest. After a review of the English cases, *Dillon, J.*, reached the conclusion that the plaintiff might recover. The decision indicates the opinion of that able judge to be that the common law, as administered here, does not prohibit such actions. But I have found no other federal court following the case, and the supreme court of the United States, in *Insurance Co. v. Brame*, *supra*, declare the proposition that by the common law no civil action lay for an injury which results in death to be one not open to question.

"Lord Campbell's Act, as we have seen, gave an action in favor of a husband and parent, as well as of a wife and child, for an injury occasioned by death. In the earliest period the common law had given to the widow and to the heir an action against the slayer of the husband and ancestor. Such actions, known as appeals of death, had fallen into disuse, and after the celebrated case of *Ashford v. Thornton*, 1 Barn. & Ald. 405, which exhibited to comparatively modern times two relics of ancient law, viz., pleadings *ore tenus* and wager of battle, were abolished by statute. As I have interpreted the common law, thenceforth an injury occasioned by death was absolutely without redress. Parliament thereupon, by Lord Campbell's Act, provided for redress for such injuries. It gave an action in favor of the widow

Campbell's Act,³¹ which, after reciting^f that no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and that it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him, enacts that "wherever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony," that "every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought, and that the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

Sec. 1385. (§ 783.) Same subject—Similar acts in the United States.—This act has been the model after which the many acts of a similar character in this country have been framed. It is believed that none of the states is without statutes which provide substantially according to the English act. And many other statutes have also been passed giving new rights of action, or extending old rights to parties not theretofore included, many being especially framed with reference to and of the children of the de- favor of the husband and the ceased. It also gave an action in parent."

31. 9th and 10th Victoria, ch. 93.

actions against railroad companies. And while these statutes are not confined either in terms or intention to carriers of passengers, but apply generally to wrong-doers of every description, more frequent occasion is perhaps found for their application to cases against such carriers than to any other class to whose acts of negligence death may be attributable; and they therefore become of the utmost importance to such carriers when it becomes necessary to inquire not only for what, but to whom, they are liable in the conduct of their business. These statutes are too numerous and too various for full consideration here, but some of the main features common to them will be noticed in the text and notes.

Sec. 1386. (§ 789.) Whether statute gives a new right of action.—The question whether the English and American acts give a new right of action to the personal representative or to the surviving kindred of the deceased, or whether they merely remove the common-law bar to a recovery where the wrongful act produces death, has been involved in much apparent conflict. Much of the uncertainty which has been supposed to involve this question has arisen from a confusion of ideas, chiefly on the part of legislators, but somewhat on the part of courts. In the legislation upon the subject, two objects may properly be aimed at: one, the survival of the common-law action of the deceased notwithstanding his death;¹ the other, a new action by his personal representatives for the benefit of certain

1. *Arkansas*: *St. Louis, etc., Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. Rep. 46; *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. Rep. 801, 7 L. R. A. 283.
- Colorado*: *Munal v. Brown*, 70 Fed. 967.
- Connecticut*: *Murphy v. Railroad Co.*, 29 Conn. 496; 30 *id.* 184; *Goodsell v. Railroad Co.*, 33 Conn. 51; *Budd v. Electric Railroad Co.*, 69 Conn. 272, 37 Atl. Rep. 683.
- Iowa*: *Sherman v. Stage Co.*, 24 Iowa, 515; *Seney v. Railroad Co.*, 125 Iowa, 290, 101 N. W. Rep. 76.
- Kansas*: *Martin v. Railroad Co.*, 58 Kan. 475, 49 Pac. Rep. 605; *Berry v. Railroad Co.*, 52 Kan. 759, 34 Pac. Rep. 805.
- Kentucky*: *Bowler v. Lane*, 3 Met. (Ky.) 311; *Hansford v. Payne*, 11 Bush, 384.
- Maine*: *State v. Railroad Co.*, 60 Me. 490; *State v. Railway Co.*, 61 Me. 114.
- Massachusetts*: *Mulchahey v. Car Wheel Co.*, 145 Mass. 281, 14 N. E. Rep. 106; *Nourse v. Pack-*

persons designated, which action is, however, usually dependent upon the condition that the deceased might himself have maintained an action (not this one) if death had not ensued.² In the accomplishment of these objects, some statutes have been framed which have evidently aimed to combine both purposes, and others which are so anomalous in their character as to render it difficult to determine what their purpose was.

In many states, statutes of both kinds exist, but, by the weight of authority, a recovery under one is a bar to a recovery under the other.³

ard, 138 Mass., 307; *Commonwealth v. Railroad Co.*, 107 Mass. 236.

The act of 1881 is prospective only. *Kelley v. Railroad Co.*, 135 Mass. 448.

Michigan: *Olivier v. Railroad Co.*, 134 Mich. 367, 96 N. W. Rep. 434, 104 Am. St. Rep. 607; *Storrie v. Elevator Co.*, 134 Mich. 297, 96 N. W. Rep. 569.

Missouri: *Gray v. McDonald*, 104 Mo. 303, 16 S. W. Rep. 398; *Proctor v. Railroad Co.*, 64 Mo. 112; *White v. Maxcy*, 64 Mo. 552; *Crumpley v. Railway Co.*, 98 Mo. 36.

New Hampshire: *Clark v. Manchester*, 62 N. H. 577; *Jewett v. Keene*, 62 N. H. 701.

Ohio: *Ohio, etc., Coal Co. v. Smith*, 53 Ohio St. 313.

South Dakota: *Belding v. Railroad Co.*, 3 S. Dak. 369, 53 N. W. Rep. 750.

Tennessee: *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. Rep. 131.

2. *England*: *Pym v. Railway Co.*, 4 B. & S. 396, 10 Jur. N. S. 199.

Alabama: *Smith v. Railroad Co.*, 75 Ala. 449.

California: *Munro v. Dredging Co.*, 84 Cal. 515, 24 Pac. Rep. 303, 18 Am. St. Rep. 248.

Idaho: *Northern Pac. Ry. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196; *reversed*, 192 U. S. 440, 48 L. Ed. 513.

Illinois: *Holton v. Daly*, 106 Ill. 131; *Mallott v. Shiner*, 153 Ind. 35, 54 N. E. Rep. 101, 74 Am. St. Rep. 278 (on Ill. statute); *Chicago v. Major*, 18 Ill. 349; *Chicago, etc., R. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, 77 Ill. 68.

Indiana: *Pittsburgh, etc., Ry. Co. v. Hosea*, 152 Ind. 412, 53 N. E. Rep. 419.

Minnesota: *Hutchins v. Railroad Co.*, 44 Minn. 5.

New York: *O'Reilly v. Stage Co.*, 87 Hun, 406, 34 N. Y. Supp. 358.

Oregon: *Perham v. Electric Co.*, 33 Ore. 451, 53 Pac. Rep. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799.

Pennsylvania: *Fink v. Garman*, 40 Pa. St. 95.

Utah: *Mason v. Railroad Co.*, 7 Utah, 77, 24 Pac. Rep. 796.

Wisconsin: *Brown v. Railroad Co.*, 102 Wis. 137, 140, 77 N. W. Rep. 748, 771, 44 L. R. A. 579; *Robertson v. Railway Co.*, 122 Wis. 66, 99 N. W. Rep. 433.

3. *Munro v. Dredging Co.*, 84 Cal. 515, 24 Pac. Rep. 303, 18 Am. St. Rep. 248; *Hartigan v. Southern Pacific Co.*, 86 Cal. 142, 24

Sec. 1387. (§ 789a.) Extraterritorial effect of these statutes.—This action being, as has been seen, a purely statutory one, it can only be brought and maintained under and by virtue of statutory authority. The statutes of one state are generally co-extensive, and only co-extensive, with the political jurisdiction of that state. Where, therefore, the death is caused in a state where no such statute is shown to exist, an action cannot be sustained in another state where such a statute is found, even though the plaintiff and the deceased were citizens of the latter state.⁴

In the absence of proof of a statute in the state where the death is caused, the common law will be presumed to prevail in that state; and the existence of a statute in the state where the action is brought will not create a right of action for an injury inflicted outside the jurisdiction of the latter state.⁵ If

Pac. Rep. 851; *Andrews v. Railway Co.*, 34 Conn. 57; *Railway Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263, *affirming* 19 Ill. App. 591; *Martin v. Railway Co.*, 58 Kan. 475, 49 Pac. Rep. 605; *Railroad Co. v. McElwain*, 98 Ky. 700, 34 S. W. Rep. 236; *Bowes v. City of Boston*, 155 Mass. 344, 29 N. E. Rep. 633; *Sweetland v. Railroad Co.*, 117 Mich. 329, 75 N. W. Rep. 1066, 43 L. R. A. 568; *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. Rep. 44; *Putnam v. Southern Pac. Co.*, 21 Ore. 230, 27 Pac. Rep. 1033; *McCafferty v. Railroad Co.*, 193 Pa. St. 346, 44 Atl. Rep. 435, 74 Am. St. Rep. 690; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. Rep. 205; *Legg v. Britton*, 64 Vt. 652, 24 Atl. Rep. 1016, *overruling* *Needham v. Railway Co.*, 38 Vt. 294.

Contra, *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. Rep. 801; *Hedrick v. Navigation Co.*, 4 Wash. 400, 30 Pac. Rep. 714.

4. *Armstrong v. Beadle*, 5 Sawy. 484; *Louisville*, etc., *R. R. Co. v. Williams*, 113 Ala. 402, 21 So. Rep. 938; *Chicago*, etc., *Ry. Co. v. Schroeder*, 18 Ill. App. 328; *Hyde v. Railway Co.*, 61 Iowa, 441, 16 N. W. Rep. 351, 47 Am. Rep. 820; *State v. Railroad Co.*, 45 Md. 41; *Debevoise v. Railroad Co.*, 98 N. Y. 377; *Whitford v. Railroad Co.*, 23 N. Y. 465; *Beach v. Steamboat Co.*, 30 Barb. 433, 10 Abb. Pr. 71, 18 How. Pr. 335, *reversing* 27 Barb. 248, 6 Abb. Pr. 415, 16 How. Pr. 1; *Vanderventer v. Railroad Co.*, 27 Barb. 244; *Vanderwerken v. Railroad Co.*, 6 Abb. Pr. 239; *Ott v. Railway Co.*, 18 O. C. C. 395, 10 O. C. D. 85; *Hover v. Railroad Co.*, 25 Ohio St. 667; *Nashville*, etc., *Railroad Co. v. Eakin*, 46 Tenn. (6 Coldw.) 582; *Willis v. Railway Co.*, 61 Tex. 432, 48 Am. Rep. 301.

5. See cases cited in preceding note, and, also, *Geoghegan v. Atlas S. S. Co.*, 3 Misc. 224, 22 N. Y.

a statute does, in fact, exist in the state where the death is caused, and an action is brought in another state, that statute must be proved and cannot be presumed.⁶

Sec. 1388. When right of action created in one state may be prosecuted in other states.—The majority of courts uphold the rule that a right of action created by statute may be prosecuted in another state when the two states have statutes relating to the subject matter which are substantially similar.⁷

Supp. 749; *Needham v. Railroad Co.*, 38 Vt. 294.

6. *Leonard v. Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Nashville, etc., Railroad Co. v. Sprayberry*, 56 Tenn. (9 Heisk.) 852; *Whitlow v. Railway Co.*, 114 Tenn. 344, 84 S. W. Rep. 618, 68 L. R. A. 503; *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 6 Atl. Rep. 648.

7. *Railway Co. v. Haist*, 71 Ark. 258, 72 S. W. Rep. 893, 100 Am. St. Rep. 65; *Kahl v. Railroad Co.*, 95 Ala. 337, 10 So. Rep. 661 (Statute of Mississippi held dissimilar to Employers' Act of Alabama); *Atlanta, etc., Ry. Co. v. Smith*, 119 Ga. 667, 46 S. E. Rep. 853; *Central R. R. Co. v. Swint*, 73 Ga. 651 (Georgia and Alabama acts held similar); *South Car. R. R. Co. v. Nix*, 68 Ga. 572 (South Carolina and Georgia acts held similar); *Shedd v. Moran*, 10 Ill. App. 618 (Indiana and Illinois acts held similar); *Chicago, etc., R. R. Co. v. Rouse*, 78 Ill. App. 286 (Indiana and Illinois acts held similar); *Hanna v. Railway Co.*, 41 Ill. App. 116 (Illinois and Canadian acts held similar); *Burns, Adm'r, v. Railroad Co.*, 113 Ind. 169, 15 N. E. Rep. 230 (Michigan and Indiana acts held similar); *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. Rep. 287, 10

Am. St. Rep. 67 (Ohio and Indiana acts held similar); *Louisville & N. Railroad Co. v. Shivell's Adm'r*, 13 Ky. L. R. 902, 18 S. W. Rep. 944 (Kentucky and Alabama acts held similar); *Wintuska's Adm'r v. Railroad Co.*, 14 Ky. L. R. 579, 20 S. W. Rep. 819 (Kentucky and Tennessee acts held similar); *Louisville, etc., R. R. Co. v. Whitlow*, 19 Ky. L. Rep. 1931, 105 Ky. 1, 43 S. W. Rep. 711, 41 L. R. A. 614; *Bruce's Adm'r v. Railroad Co.*, 7 Ky. L. R. 469, 83 Ky. 174 (Tennessee and Kentucky acts held similar); *Higgins v. Central, etc., R. Co.*, 155 Mass. 176, 29 N. E. Rep. 534, 31 Am. St. Rep. 544; *Walsh v. New York, etc., R. Co.*, 160 Mass. 571, 36 N. E. Rep. 584, 39 Am. St. Rep. 514; *Davis v. Railroad Co.*, 143 Mass. 301, 9 N. E. Rep. 815; *Nicholas v. Railway Co.*, 78 Minn. 43, 80 N. W. Rep. 776 (Minnesota and South Dakota acts held similar); *Ill. Cent. R. R. Co. v. Crudup*, 63 Miss. 291 (Mississippi and Tennessee acts held similar); *Chicago, etc., Railroad Co. v. Doyle*, 60 Miss. 977 (Mississippi and Tennessee acts held similar); *Missouri Pac. Ry. Co. v. Lewis*, 24 Neb. 848, 40 N. W. Rep. 401 (Nebraska and Kansas statutes held similar); *Wooden v. Railroad Co.*, 126 N. Y. 10, 26 N. E. Rep.

Under this rule if no statute is in existence in the state where the suit is brought, no recovery can be had under the statute of

1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; *Leonard v. Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 49; *Strauss v. New York, etc., R. Co.*, 87 N. Y. Supp. 67, 91 App. Div. 583; *Gurney v. Railway Co.*, 13 N. Y. Supp. 645; *Cavanaugh v. Nav. Co.*, 13 N. Y. Supp. 540; *Lustig v. Railroad Co.*, 20 N. Y. Supp. 477; *Wabash R. R. Co. v. Fox*, 64 Ohio St. 133, 59 N. E. Rep. 888, 83 Am. St. Rep. 739 (Indiana statute held dissimilar to that of Ohio); *Knight v. Railroad Co.*, 108 Pa. St. 250, 56 Am. Rep. 200 (Pennsylvania and New Jersey statutes held similar); *O'Reilly v. Railroad Co.*, 16 R. I. 388, 17 Atl. Rep. 171, 906, 19 Atl. Rep. 244, 5 L. R. A. 364, 6 L. R. A. 719; *Whitlow v. Railway Co.*, 114 Tenn. 344, 84 S. W. Rep. 618, 68 L. R. A. 503 (Alabama and Tennessee statutes held similar); *Mississippi, etc., Railroad Co. v. Ayres*, 84 Tenn. (16 Lea) 725 (Mississippi and Tennessee statutes held similar); *Nashville, etc., R. R. Co. v. Sprayberry*, 56 Tenn. (9 Heisk.) 852 (Mississippi and Tennessee statutes held similar); *St. Louis, etc., Ry. Co. v. McCormick*, 71 Tex. 660, 9 S. W. Rep. 540, 1 L. R. A. 804 (Arkansas and Texas statutes held dissimilar); *Belt v. Railway Co.*, 4 Tex. Civ. App. 231, 22 S. W. Rep. 1062 (Arkansas and Texas acts held dissimilar); *De Harn v. Mex. Nat. R. Co.*, 86 Tex. 68, 23 S. W. Rep. 381 (Mexican and Texas acts held dissimilar); *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 6 Atl. Rep. 648; *Nelson v. Railroad Co.*, 88 Va. 971, 14 S. E. Rep. 838, 15 L. R. A. 583; *Eingartner v. Ill. Steel Co.*, 94 Wis. 70, 68 N. W. Rep. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Baltimore & O. R. Co. v. Chambers*, — Ohio St. —, 76 N. E. Rep. 91.

In *Ash v. Railroad Co.*, 72 Md. 144, it appeared that the code in Maryland gave a right of action, to be brought in the name of the state, for the benefit of the wife, husband, parent or child of the deceased. The code of West Virginia provided that every such action shall be brought by and in the name of the personal representative of the deceased. It was held that an administratrix appointed in Maryland could not there maintain an action on the West Virginia statute for a death caused in the latter state. Said the court:

"We are aware that there is some diversity of opinion upon the subject; but we are not aware that there is any well-considered case that holds that the action may be maintained in a state other than that in which the accident occurred, on the same state of facts as here presented, and where there existed in the statutes of the two states, upon this subject, such dissimilarity of provisions as we find to exist in the statutes of West Virginia and Maryland.

"In *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, it was held that an administrator appointed in the state of New York might maintain an action for the death of his intestate, occasioned by the negligent injury inflicted by the defendant in another state having

a statute substantially like the New York statute, allowing an action of damages for death by negligence to be prosecuted by the personal representative of the deceased. And in the case of *Dennick v. Railroad Co.*, 103 U. S. 11, brought up from a circuit court sitting in New York, the same rule of decision is maintained as that laid down in *Leonard v. Columbia Steam Nav. Co.*, *supra*. This case in 103 U. S. 11, is much relied on by the plaintiff; but the facts of that case are not similar to the facts of the present case. In that case the death occurred in New Jersey, and the action was brought by an administratrix appointed in New York; and, in delivering the opinion, the supreme court said, 'that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and that an administrator appointed under the law of that state would be held to have recovered to the same uses, and subject to the remedies in his fiduciary character which both statutes prescribes.' The court also said 'that the questions growing out of these statutes are new, and many of them unsettled. Each state court will construe its own statute on the subject, and differences are to be expected.' It is clear, therefore, that the decision in the case reported in 103 U. S. does not apply to this case.

"But even the qualified decisions of the court of appeals of New York, and of the supreme court of the United States, upon this subject, have not met with

general approval, and have not been generally followed by subsequent state court decisions.

"In the recent case of *Davis v. New York & New England Railroad Co.*, 143 Mass. 301, it was held by the supreme court of Massachusetts that an action by an administrator could not be maintained in that state for the death of a person caused by the negligence of the defendant in another state, the remedies provided in the two states not being alike; and the court expressly declined to depart from its own previous decision in *Richardson v. Railroad Co.*, 98 Mass. 85, and follow the general doctrine laid down in *Dennick v. Railroad Co.*, 103 U. S. 11.

"And so in the case of *Vawter v. The Missouri Pacific Railroad Co.*, 84 Mo. 679, where it was held by the supreme court of Missouri that an administrator appointed in that state could not maintain an action there for the death of his intestate by negligence of the defendant in Kansas, such action being allowed by the statute of Kansas, but not by that of Missouri. There, also, the cases of *Dennick v. Railroad Co.*, and *Leonard v. Steam Nav. Co.*, *supra*, were pressed upon the court for the general doctrine there laid down; but the supreme court of Missouri declined to adopt or follow those cases, and decided in accordance with what was taken to be the well-established general principle of interstate law in such cases. And even in New York, in the recent case of *Debevoise v. Railroad Co.*, 98 N. Y. 397, it was held that an action by an administrator for damages for the death of

the other state where the death is caused.⁸ Realizing the narrowness of this doctrine, there are courts which go farther and hold that a cause of action founded upon the statute in one state, conferring the right to recover damages for injuries resulting in death, may be enforced in a court of another state, or a court of the United States sitting in another state, when it is not inconsistent with the statutes or public policy of the state in which the action is brought.⁹ The existence of similar legislation is immaterial under this latter doctrine, the only real question being whether the right of recovery given for a wrongful death in one state is so dissimilar as to be incapable of enforcement in the state where the action is brought.¹⁰

If the right of recovery given by a statute is penal in its

his intestate, caused by the negligence of the defendant in another state, could not be maintained in the courts of New York without proof of the existence of a like statute to that of New York in the state where the accident occurred, thus showing that the right of action given by statute for the death of an individual is not transitory like the common-law right of action for personal injuries, but the operation and force of such statute must be confined to the state enacting it, except where it can be extended by comity. And whether an action would be sustained by the courts of this state for the death of a person occurring in another state having a statute of the same or like provisions as our own is a question not presented in this case, and in regard to which we express no opinion."

8. *Richardson v. New York Cent. R. R. Co.*, 98 Mass. 85; *Texas, etc., Ry. Co. v. Richards*, 68 Tex. 375, 4 S. W. Rep. 627.

9. *Dennick v. Railroad Co.*, 103

U. S. 11, 26 L. Ed. 439; *Texas & P. Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. R. 905; s. c. 68 Tex. 375, 4 S. W. Rep. 627; *Stockwell v. Boston & M. R. Co.*, 131 Fed. 153; *Smith v. Empire State-Idaho, etc., Co.*, 127 Fed. 462; *Burrell v. Fleming*, 109 Fed. 489, 47 C. C. A. 598; *Boston & M. Railroad Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 35 C. C. A. 282; *Law v. Railway Co.*, 91 Fed. 817; *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943; *Morris v. Railway Co.*, 65 Iowa, 727, 23 N. W. Rep. 143, 54 Am. Rep. 39; *Herrick v. Railway Co.*, 31 Minn. 11, 16 N. W. Rep. 413, 47 Am. Rep. 771; *Stoeckman v. Railroad Co.*, 15 Mo. App. 503.

10. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 24 Sup. Ct. R. 581, 48 L. Ed. 900, *affirming* *Mexican Nat. R. Co. v. Slater*, 115 Fed. 593, 53 C. C. A. 239. (In this case it was held that a jury could not commute into a lump sum in Texas the right of recovery given in Mexico.)

nature, it will not be enforced, of course, in other jurisdictions.¹¹

Sec. 1389. (§ 783a.) Who may sue under these statutes.—

The statutes in force in the different states are so numerous, and, though usually similar in purpose, are so varied in their language and construction, that no general rule can be laid down by which to determine in whom the right of action under them is vested, although in Lord Campbell's Act, and most of them in the various states modeled upon it, the right of action is in terms given to the personal representative of the deceased person. The practitioner must in each case consult the statute in question, the construction, if any, given it by the state of its adoption, and get such light from analogous statutes in other states as is available. Some references will be found in the note¹² to these acts, and the latest cases dealing with the ques-

11. *Marshall v. Railroad Co.*, 46 Fed. 269 (Missouri statute held to be penal); *Raisor v. Railroad Co.*, 215 Ill. 47, 74 N. E. Rep. 69 (Missouri statute held to be penal); *Matheson v. Railroad Co.*, 61 Kan. 667, 60 Pac. Rep. 747 (Missouri statute held to be penal); *Hamilton v. Railroad Co.*, 39 Kan. 56, 18 Pac. Rep. 57 (Missouri statute held to be penal); *McCarthy v. Railroad Co.*, 18 Kan. 46 (Missouri statute held to be penal); *Dale v. Railroad Co.*, 57 Kan. 601, 47 Pac. Rep. 521 (New Mexico statute held to be penal); *O'Reilly v. Railroad Co.*, 16 R. I. 388, 17 Atl. Rep. 171, 906, 19 Atl. Rep. 244, 5 L. R. A. 364, 6 L. R. A. 719 (a Massachusetts act held penal); *Adams v. Railroad Co.*, 67 Vt. 76, 30 Atl. Rep. 687, 48 Am. St. Rep. 800 (a Massachusetts act held penal).

12. In *England*, see *Davidson v. Hill*, (1901) 2 K. B. 606, 70 L. J. K. B. 788.

In *Alabama*, see *Lovell v. Iron*

Co., 90 Ala. 13, 7 S. Rep. 756; *Stewart v. Railroad Co.*, 83 Ala. 493; *Columbus, etc., R. Co. v. Bradford*, 86 Ala. 574; *South, etc., R. Co. v. Sullivan*, 59 Ala. 272; *Georgia, Pac. Ry. Co. v. Propst*, 83 Ala. 518; *McGhee v. McCarley*, 103 Fed. 55, 44 C. C. A. 252, *changing on rehearing* 91 Fed. 462, 33 C. C. A. 629, 63 U. S. App. 422; *Williams v. Railroad Co.*, 91 Ala. 635, 9 So. Rep. 77; *Mobile, etc. Ry. Co. v. Bromberg*, 141 Ala. 259, 37 So. Rep. 395.

In *Arkansas*, see *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. Rep. 801; *St. Louis, etc., Ry. Co. v. Yocum*, 34 Ark. 493; *Railway Co. v. Needham*, 52 Fed. Rep. 371, 3 C. C. A. 129; *St. Louis, etc., Ry. Co. v. Garner*, — Ark. —, 89 S. W. Rep. 550; *Rutherford v. Foster*, 125 Fed. 187, 60 C. C. A. 129.

In *California*, statute has no extra territorial force. *Armstrong v. Beadle*, 5 Sawy. 184.

tion of the proper persons to sue under them, though lack of space renders a full discussion impossible.

Sec. 1390. Who may sue when action is brought in state other than one where death is caused. — Although such

See, also, *Ruppel v. United Railroads*, 1 Cal. App. 666, 82 Pac. Rep. 1073; *Delatour v. Mackey*, 139 Cal. 621, 73 Pac. Rep. 454.

In *Colorado*, see *Pierce v. Conners*, 20 Colo. 178, 37 Pac. Rep. 721, 46 Am. St. Rep. 279; *Hayes v. Williams*, 17 Colo. 465, 30 Pac. Rep. 352.

In *Connecticut*, see *Goodsell v. Railroad Co.*, 33 Conn. 51.

In the *District of Columbia*, see *Ferguson v. Railroad Co.*, 6 App. D. C. 525; *Western Union Tel. Co. v. Lipscomb*, 22 App. D. C. 104.

In *Florida*, see *Railroad Co. v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; *Louisville, etc., R. R. Co. v. Jones*, — Fla. —, 34 So. Rep. 246.

In *Georgia*, children may recover for death of parent and for mother's death where she had the burden of their support, their father being dead. *Scott v. Railroad Co.*, 77 Ga. 450; *Snell v. Smith*, 78 Ga. 355. See, also, *Atlanta, etc., R. Co. v. Venable*, 65 Ga. 55. Under a statute extending a right to one who is dependent on deceased, such dependency must be shown. *Clay v. Railroad Co.*, 84 Ga. 345. Wife living separate from husband and dependent on minor son may recover for latter's death. *East Tennessee R. Co. v. Maloy*, 77 Ga. 237. As to adult child's right to recover for death of parent. *Central, etc., Co. v. Roach*, 70 Ga. 434. See, also, *Robinson v. Railroad Co.*, 117 Ga.

168, 97 Am. St. Rep. 156, 43 S. E. Rep. 452; *Railway Co. v. Glover*, 92 Ga. 132, 18 S. E. Rep. 406.

In *Idaho*, see *Northern Pacific R'y. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196; *reversed*, 192 U. S. 440, 48 L. Ed. 513.

In *Illinois*, see *Perry v. Carmichael*, 95 Ill. 519; *Railway Co. v. Shacklet*, 105 Ill. 364, *affirming* 10 Ill. App. 404; *Railway Co. v. Shacklet*, 119 Ill. 232, 10 N. E. Rep. 896; *Mattoon, etc. Co. v. Dolan*, 105 Ill. App. 1; *Chicago, etc., R. Co. v. O'Donnell*, 114 Ill. App. 346; *affirmed*, 213 Ill. 545, 72 N. E. Rep. 1133.

In *Indiana*, see *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. Rep. 875; *Lake Erie, etc. R. R. Co. v. Charmon*, 161 Ind. 95, 67 N. E. Rep. 923; *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. Rep. 527; *Louisville, etc. R. R. Co. v. Goodykoontz*, 119 Ind. 111; *Gann v. Worman*, 69 Ind. 458; *Collins Coal Co. v. Hadley*, — Ind. App. —, 75 N. E. Rep. 832; *Dillier v. Railway Co.*, 34 Ind. App. 52; 72 N. E. Rep. 271; *Duzan v. Myers*, 30 Ind. App. 227, 65 N. E. Rep. 1046, 96 Am. St. Rep. 341.

In *Iowa*, see *Ewell v. Railroad Co.*, 29 Fed. Rep. 57; *Worden v. Railway Co.*, 72 Iowa, 201; *Conners v. Railway Co.*, 71 Iowa, 490; *Major v. Railway Co.*, 115 Iowa, 309, 88 N. W. Rep. 815.

In *Kansas*, the only action is that by personal representative

actions are usually brought for the benefit of persons other than the nominal plaintiff, the majority of courts hold that the

(*Hulbert v. Topeka*, 34 Fed. Rep. 510), who is trustee for distributee. *Union Pac. R. Co. v. Dunden*, 37 Kan. 1. See also, *Limekiller v. Hannibal, etc. R. Co.*, 33 Kan. 83, 5 Pac. Rep. 401; *Atchison, etc., R'y. Co. v. Townsend*, ——— Kan. ———, 81 Pac. Rep. 205; *Chicago, etc., R. Co. v. Mills*, 57 Kan. 687, 47 Pac. Rep. 834; *Jones v. Railroad Co.*, 178 Mo. 528, 77 S. W. Rep. 890. (On Kansas statute.)

In *Kentucky*, an action cannot be maintained by personal representative for the death of an intestate leaving neither a widow or children (*Kentucky, etc. R. Co. v. Wainwright*, (Ky.), 13 S. W. Rep. 438; *Jordan v. Railway Co.*, 11 Ky. L. R. 204, 11 S. W. Rep. 1013; *Louisville, etc. R. Co. v. Merriwether*, (Ky. L. R.), 12 S. W. Rep. 935); nor under a statute giving a right of action to one not an employee can the representative of an employee recover. *Cincinnati, etc. R'y Co. v. Adams*, 11 Ky. L. R. 833, 13 S. W. Rep. 428. The personal representative appointed in Kentucky may sue in that state for damages under the law of Tennessee, where the intestate was killed. *Bruce v. Railroad Co.*, 83 Ky. 174. The word "heir" in the statutes means "child" and does not include parents or personal representatives. *Jordan v. Railway Co.*, *supra*; *Henning v. Leather Co.*, 11 Ky. L. R. 544, 12 S. W. Rep. 550; *Louisville, etc. R. Co. v. Coppage*, 12 Ky. L. R. 200, 13 S. W. Rep. 1086. As to when representatives may recover, see *Morris v. Railroad Co.*, 11 Ky.

L. R. 698, 12 S. W. Rep. 940. As to when widow and children have prior right, *Henderson v. Railroad Co.*, 86 Ky. 389. No action where wilfully and intentionally inflicted. *Winnegar v. Railway Co.*, 85 Ky. 547. See also, *Railroad v. McElwain*, 98 Ky. 700, 34 S. W. Rep. 236; *McLemore v. Sebree Coal & Mining Co.*, ——— Ky. ———, 88 S. W. Rep. 1062; *Thomas v. Royster*, 98 Ky. 206, 32 S. W. Rep. 613.

In *Louisiana*, see *Curley v. Railroad Co.*, 40 La. Ann. 810, 6 So. Rep. 103; *Clairan v. W. U. T. Co.*, 40 La. Ann. 178, 3 So. Rep. 625.

In *Maine*, see *State v. Bangor*, 30 Me. 341; *Corrigan v. Stillwell*, 97 Me. 247, 54 Atl. Rep. 389, 61 L. R. A. 163.

In *Maryland*, see *Baltimore, etc. R. Co. v. State*, 60 Md. 449; *Albert v. State*, 66 Md. 325, 7 Atl. Rep. 697.

In *Massachusetts*, see *Ramsdell v. Railroad Co.*, 151 Mass. 245, 23 N. E. Rep. 1103; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. Rep. 386, 79 Am. St. Rep. 309; *Smith v. Electric Co.*, 188 Mass. 371, 74 N. E. Rep. 664.

In *Michigan*, the action, by the terms of the statute, is to be brought in the name of the personal representative. How. Stat. §§ 3391, 3392, 8313, 8314. As to when mother may sue, see *Rajnowski v. Railroad Co.*, 74 Mich. 20.

In *Minnesota*, see *Scheffler v. Railway Co.*, 32 Minn. 125; *Nash v. Tousley*, 28 Minn. 5; *Schwarz v. Judd*, 28 Minn. 371; *Renlund Co. v. Mining Co.*, 89 Minn. 41, 93

action must be brought by the party named in the statute creating the liability for death by wrongful act, even though the

N. W. Rep. 1057, 99 Am. St. Rep. 534; *Foot v. Railway Co.*, 81 Minn. 493, 84 N. W. Rep. 342, 83 Am. St. Rep. 395; *Swift v. Johnson*, — C. C. A. —, 138 Fed. 867; *Ander-son v. Fielding*, 92 Minn. 42, 99 N. W. Rep. 357, 104 Am. St. Rep. 665.

In *Mississippi*, mother may not sue. *Amos v. Railroad Co.*, 63 Miss. 509. Administrator may sue. *Vicksburg, etc. R. Co. v. Phillips*, 64 Miss. 693. See also, *Bussey v. Gulf, etc. R. Co.*, 79 Miss. 597, 31 So. Rep. 212; *I. C. R. R. Co. v. Hunter*, 70 Miss. 471, 12 So. Rep. 482; *I. C. R. R. Co. v. Pendergrass*, 69 Miss. 425, 12 So. Rep. 954.

In *Missouri*, parent may sue only when child is a minor. *Parsons v. Railroad Co.*, 94 Mo. 286. Widow may sue when. *Barker v. Railroad Co.*, 91 Mo. 86. Non-resident may sue. *Phillpott v. Railway Co.*, 85 Mo. 164. See *Gibbs v. Hannibal*, 82 Mo. 143; *Rutter v. Railway Co.*, 81 Mo. 169; *McIntosh v. Railway Co.*, 103 Mo. 131, 15 S. W. Rep. 80; *Hennessey v. Brewing Co.*, 145 Mo. 104, 46 S. W. Rep. 966, 68 Am. St. Rep. 554, 51 L. R. A. 385; *Lee v. Knapp*, 155 Mo. 610, 56 S. W. Rep. 458; *Packard v. Railroad Co.*, 181 Mo. 421, 80 S. W. Rep. 951, 103 Am. St. Rep. 607; *Case v. Min. Co.*, 103 Mo. App. 477, 78 S. W. Rep. 62; *Casey v. Transit Co.*, — Mo. App. —, 91 S. W. Rep. 419.

In *Nebraska*, action must be by representative. *Wilson v. Bumstead*, 12 Neb. 1; *Railway Co. v. Young*, 58 Neb. 678, 79 N. W. Rep. 556.

In *Nevada*, see *Peers v. Nevada, etc., Co.*, 119 Fed. 400; *Roach v.*

Imperial Mining Co., 7 Fed. 698.

In *New Hampshire*, see *Wyatt v. Williams*, 43 N. H. 102.

In *New Jersey*, see *Grosso v. Railroad Co.*, 50 N. J. L. 317; *Dennick v. Railroad Co.*, 103 U. S. 11; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438; *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. Rep. 777; *Fitzhenry v. Traction Co.*, 63 N. J. L. 142, 42 Atl. Rep. 416; *Gottlieb v. Railroad Co.*, 71 N. J. L. 47, 58 Atl. Rep. 1088; *Gottlieb v. Rail-way Co.*, — N. J. L. —, 63 Atl. Rep. 339.

In *New Mexico*, see *Isaac v. Rail-way*, 12 Daly, 340; *Romero v. Rail-way Co.*, 11 New Mex. 679, 72 Pac. Rep. 37.

In *New York*, see *McDonald v. Mallory*, 77 N. Y. 546; *Meekin v. Railroad Co.*, 164 N. Y. 145, 58 N. E. Rep. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635; *Austin v. Met-ropolitan St. Ry. Co.*, 95 N. Y. Supp. 740, 108 App. Div. 249.

In *North Carolina*, action must be brought within one year. *Taylor v. Coal Co.*, 94 N. C. 525. See also, *Killian v. Southern R. Co.*, 128 N. C. 261, 38 S. E. Rep. 873; *Howell v. County*, 121 N. C. 362, 28 S. E. Rep. 362; *Davis v. Railroad Co.*, 136 N. C. 115, 48 S. E. Rep. 591.

In *North Dakota*, see *Harshman v. Railway Co.*, — N. Dak. —, 103 N. W. Rep. 412.

In *Ohio*, see *Wolf v. Railroad Co.*, 55 Ohio St. 517, 45 N. E. Rep. 708, 36 L. R. A. 812.

In *Oklahoma*, see *Oklahoma Gas, etc., Co. v. Lukert*, — Okla. —, 84 Pac. Rep. 1076.

In *Oregon*, see *Perham v. Elec-*

tric Co., 33 Ore. 451, 53 Pac. Rep. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799.

In *Pennsylvania*, see Books v. Danville, 95 Penn. St. 158; Leman v. Railroad Co., 128 Fed. 191; Deni v. Railroad Co., 181 Pa. St. 525, 37 Atl. Rep. 558, 59 Am. St. Rep. 676; Railroad v. Conway, 112 Pa. St. 511, 4 Atl. Rep. 362; Haughey v. Railway Co., 210 Pa. 367, 59 Atl. Rep. 1112; Boulden v. Pennsylvania R. Co., 205 Pa. St. 264, 54 Atl. Rep. 906.

In *Rhode Island*, see Gorman v. Budlong, 23 R. I. 169, 49 Atl. Rep. 704, 91 Am. St. Rep. 629; Lubrano v. Atlantic Mills, 19 R. I. 129, 32 Atl. Rep. 205, 34 L. R. A. 797; Goodwin v. Nicholson, 17 R. I. 478, 23 Atl. Rep. 12.

In *South Carolina*, see Brickman v. Railroad Co., 8 S. C. 173.

In *South Dakota*, see Belding v. Railroad Co., 3 S. Dak. 369, 53 N. W. Rep. 750; Bowen v. Ill. Cent. R. Co., 69 C. C. A. 444, 136 Fed. 306.

In *Tennessee*, a non-resident widow may recover under state statute for injuries there inflicted, though husband was non-resident and entered into employment out of the state. Chesapeake, etc. R. Co. v. Higgins, 85 Tenn. 620. See also, Webb v. Railroad Co., 88 Tenn. 119, 12 S. W. Rep. 428; Railroad v. Bean, 94 Tenn. 388, 29 S. W. Rep. 370. Chattanooga, etc. R. R. Co. v. Johnson, 97 Tenn. 667, 37 S. W. Rep. 558, 34 L. R. A. 442.

In *Texas*, under a statute giving a cause of action to surviving husband, widow or heir, a parent may not sue. Winnt v. Railroad Co., 74 Tex. 32. Wife or children may sue after his death, though de-

ceased had begun action in his lifetime. International, etc. R. Co. v. Kuehn, 70 Tex. 582. As to who may be parties, East, etc. R'y Co. v. Culberson, 68 Tex. 664. Wife may sue though living separate. Dallas, etc. R'y Co. v. Spicker, 61 Tex. 427. As to right of administrator, see Houston, etc. R'y Co. v. Hook, 60 Tex. 403. See, also, Galveston, etc. R. Co. v. Le Gierse, 51 Tex. 189; Houston, etc. R'y Co. v. Moore, 49 Tex. 31; Missouri Pac. R'y Co. v. Henry, 75 Tex. 220. Posthumous child is to be classed with "children" named in the statute. Nelson v. Railroad Co., 78 Tex. 621. See also, De Garcia v. Railway Co., (Tex. Civ. App.) 90 S. W. Rep. 670; s. c. 77 S. W. Rep. 275.

In *Utah*, see Utah, etc. Co. v. Diamond Coal, etc. Co., 26 Utah, 299, 73 Pac. Rep. 524; Pugmire v. Diamond Coal, etc., Co., 26 Utah, 115, 72 Pac. Ry. 385.

In *Vermont*, see Lazelle v. Town of Newfane, 70 Vt. 440, 41 Atl. Rep. 511; Carty's Adm'r v. Village of Winooski, — Vt. —, 62 Atl. Rep. 45.

In *Washington*, see Manning v. Railway & Power Co., 34 Wash. 406, 75 Pac. Rep. 994; Noble v. Seattle, 19 Wash. 133, 52 Pac. Rep. 1013, 40 L. R. A. 822; Nesbitt v. Railway Co., 22 Wash. 698, 61 Pac. Rep. 141; Robinson v. Railroad Co., 26 Wash. 484, 67 Pac. Rep. 274; Johnson v. Seattle Electric Co., 39 Wash. 211, 81 Pac. Rep. 705; Copeland v. Seattle, 33 Wash. 415, 74 Pac. Rep. 582, 65 L. R. A. 333.

In *West Virginia*, see Dimmey v. Wheeling, etc. R. Co., 27 W. Va. 32; Hanley v. Railway Co., — W. Va. —, 53 S. E. Rep. 625;

statute relied on is a foreign one.¹ Thus it has been held that a father in his individual capacity cannot maintain an action in Indiana for the death of his son in Ohio where the Ohio statute provides that the action shall be brought in the name of the personal representative of the deceased.² A much broader rule, however, has been laid down in the Supreme Court of the United States in an action for a wrongful death caused in Maryland, the action being brought by a District of Columbia representative in the District of Columbia. The Maryland wrongful death statute did not confer the right of action on the personal representative, but upon the state for the benefit of certain named beneficiaries. It is certain that the District of Columbia personal representative could not have sued on that statute in Maryland, yet the United States Supreme Court held that an action by him in the District of Columbia could be maintained.³

Some cases hold that where the statute gives such right of action to the personal representative of the deceased, it can only be maintained by an administrator or executor appointed and acting under the laws of the state which enacted the statute, taking the ground that this right of action is not a right of property which passes to the estate, but is for the benefit of the family or next of kin of the deceased, and therefore the

Richards v. Riverside Iron Works, 56 W. Va. 510, 49 S. E. Rep. 437.

In *Wisconsin*, see *Schmidt v. Deegan*, 69 Wis. 300; *Quackenbush v. Railroad Co.*, 71 Wis. 472; *Robertson v. Railway Co.*, 122 Wis. 66, 99 N. W. Rep. 433; *McMillan v. Spider Lake, etc. Co.*, 115 Wis. 332, 91 N. W. Rep. 979, 95 Am. St. Rep. 947; *Nemecsek v. Filer & Stowell Co.*, — Wis. —, 105 N. W. Rep. 225.

In *Wyoming*, see *Mestas v. Diamond Coal & Coke Co.*, 12 Wyo. 414, 76 Pac. Rep. 567.

1. *Fabel v. Railway Co.*, 30 Ind. App. 268, 65 N. E. Rep. 929; *Oates*

v. Union Pac. R. Co., 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348; *Lower v. Segal*, 59 N. J. L. 66, 34 Atl. Rep. 345; *Usher v. West Jersey R. Co.*, 126 Pa. St. 206; 17 Atl. Rep. 597, 4 L. R. A. 261, 12 Am. St. Rep. 863; *Vaughn v. Bunker Hill, etc., Co.*, 126 Fed. 895. But see *McGinnis v. Foundry Co.*, 178 Mo. 225, 73 S. W. Rep. 586; *Bussey v. Railway Co.*, — S. C. —, 53 S. E. Rep. 165.

2. *Fabel v. Railway Co.*, *supra*.

3. *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. R. 105, 42 L. Ed. 537, *reversing* 6 App. D. C. 56. For criticism of

statute contemplates the exercise of the power and the execution of the trust only by a personal representative appointed under domestic laws.⁴ This doctrine, however, has been expressly disapproved in a number of cases, and is directly opposed to the weight of judicial authority.⁵

Sec. 1391. (§ 789b.) Effect of deceased's contributory negligence or his settlement of the action.—The action under Lord Campbell's Act and the statutes modeled after it, being expressly given in those cases in which the deceased might have maintained the action, if death had not ensued, it follows that whatever defenses exist arising out of the acts or omissions of the deceased, as his settlement of the injury in his life-time⁶ or

this case see *Williams v. Railway Co.*, 138 Fed. 571 and *Sanbo v. Coal Co.*, 130 Fed. 52.

4. *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39, Am. Rep. 244; *overruled in Bruce's Adm'r v. Railroad Co.*, 7 Ky. L. R. 469, 83 Ky. 174; *Ash v. Railroad Co.*, 72 Md. 144, 19 Atl. 643; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Woodward v. Railroad Co.*, 10 Ohio St. 121.

5. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; Ill. Cent. Railroad Co. *v. Crudup*, 63 Miss. 291; *Missouri Pac. Ry. Co. v. Lewis*, 24 Neb. 848, 40 N. W. Rep. 401; *Leonard v. Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Gurney v. Railway Co.*, 13 N. Y. Supp. 645; *Stoeckman v. Railroad Co.*, 15 Mo. App. 503.

Where a statute expressly inhibits the right of an administrator to bring suit, no action can be maintained by a domestic administrator on a foreign right of action. *Vawter v. Railway Co.*, 84 Mo. 679, 54 Am. Rep. 105.

6. There is great conflict of

authority upon this point. Among cases upholding the text are: *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 555, 37 L. J. Q. B. 278; *Southern Bell Tel., etc., Co. v. Cassin*, 111 Ga. 575, 36 S. E. Rep. 881, 50 L. R. A. 694; *Hill v. Penn. R. Co.*, 178 Pa. St. 223, 35 Atl. Rep. 997, 56 Am. St. Rep. 754, 35 L. R. A. 196; *Brown v. Chattanooga, etc. R. Co.*, 101 Tenn. 252, 47 S. W. Rep. 415, 70 Am. St. Rep. 666; *Missouri, etc. Ry. Co. v. Brantley*, 26 Tex. Civ. App. 11, 62 S. W. Rep. 94; *Baltimore, etc., R. R. Co. v. Ray*, — Ind. App. —, 73 N. E. Rep. 942. (This, however, was where a railroad operated a relief department, and stipulated that any damages recovered should operate as a release to the relief department.)

See *contra*, Ill. Cent. R. R. Co. *v. Cozby*, 69 Ill. App. 256; *Pittsburg, etc., R'y. Co. v. Hosea*, 152 Ind. 412, 53 N. E. Rep. 419; *Chicago, etc. R. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. Rep. 1120; *McKeering v. Penn. R. Co.*, 65 N. J. L. 57, 56 Atl. Rep. 715.

his contributory negligence,⁷ may be made where the action is brought by his representatives.

Sec. 1392. (§ 789c.) Effect of beneficiaries' contributory negligence or release.—So ordinarily, when a person entitled to the benefits of the action has made a settlement of the injury,⁸ or has himself contributed to cause the death,⁹ there can be no recovery as to him. But a settlement by one beneficiary

See, also, *Adams v. Railway Co.*, 95 Fed. 938; *Clark v. Geer*, 86 Fed. 447, 32 C. C. A. 295.

7. *McAdory v. Railroad Co.*, 109 Ala. 636, 19 So. Rep. 905; *Little Rock, etc., R'y. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. Rep. 503; *Gay v. Winter*, 34 Cal. 153; *Quinn v. Railroad Co.*, 56 Conn. 44, 12 Atl. Rep. 97; *Neal v. Electric Ry. Co.*, 3 Penne. 467, 53 Atl. Rep. 338; *Central Railroad & B. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. Rep. 827; *Chicago & A. Railroad Co. v. Fiet-sam*, 123 Ill. 518, 15 N. E. Rep. 169; *Indiana, etc. Ry. Co. v. Greene*, 106 Ind. 279, 6 N. E. Rep. 603, 55 Am. Rep. 736; *Lane v. Railway Co.*, 69 Iowa, 443, 29 N. W. Rep. 419; *Clarke v. Railroad Co.*, 101 Ky. 34, 39 S. W. Rep. 840, 18 Ky. L. R. 1082, 36 L. R. A. 123; *Murray v. Railroad Co.*, 31 La. Ann. 490; *State v. Railroad Co.*, 76 Me. 357; *State v. Railroad Co.*, 75 Md. 152, 23 Atl. Rep. 310, 32 Am. St. Rep. 372; *Hudson v. Rail-road Co.*, 185 Mass. 510, 71 N. E. Rep. 66; *Saner v. Railway Co.*, 108 Mich. 31, 65 N. W. Rep. 624; *Huel-senkamp v. Railway Co.*, 34 Mo. 45; *Blaker v. Railway Co.*, 30 N. J. Eq. 240; *Cordell v. Railroad Co.*, 75 N. Y. 330; *Cameron v. Railway Co.*, 8 N. Dak. 618, 80 N. W. Rep. 885; *Texas & P. R'y. Co. v. Carl-ton*, 60 Tex. 397; *Driver v. Rail-*

road Co., 103 Va. 650, 49 S. E. Rep. 1000.

Contributory negligence, how-ever, is no bar to an action when the injury resulting in death is wilfully or wantonly inflicted. *Louisville, etc., R. R. Co. v. Brice*, 84 Ky. 298, 1 S. W. Rep. 483, 8 Ky. L. R. 271; *Tucker v. State*, 89 Md. 471, 43 Atl. Rep. 778, 44 Atl. Rep. 1004; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. Rep. 398; *Mat-thews v. Warner*, 29 Gratt. 570, 26 Am. Rep. 396.

8. *Mattoon, etc. Co. v. Dolan*, 105 Ill. App. 1; *Foot v. Great Northern R. Co.*, 81 Minn. 493, 84 N. W. Rep. 342, 83 Am. St. Rep. 395, 52 L. R. A. 354; *Stuebing v. Marshall*, 10 Daly, 406; *Doyle v. New York, etc. R. Co.*, 72 N. Y. Supp. 936, 66 App. Div. 398; *Schmidt v. Deegan*, 69 Wis. 300, 34 N. W. Rep. 83; *Hodge v. Rurland R. Co.*, 97 N. Y. Supp. 1107; *Northern Pac. Ry. Co. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. 513.

But see *Tarbell v. Railroad Co.*, 73 Vt. 347, 51 Atl. Rep. 6, 87 Am. St. Rep. 734.

9. *St. Louis, etc. R'y. Co. v. Free-man*, 36 Ark. 41; *St. Louis, etc. R'y. Co. v. Dawson*, 68 Ark. 1, 56 S. W. Rep. 46; *Pekin v. Mc-Mahon*, 154 Ill. 141, 39 N. E. Rep. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206; *Pittsburgh, etc. R'y. Co. v.*

alone,¹⁰ or the contributory negligence of one beneficiary,¹¹ will not be a bar to an action on behalf of the other beneficiaries.

Sec. 1393. What law governs as to the effect of contributory negligence or of a release.—The effect of contributory negligence on a right of recovery for death by wrongful act is determined by the law of the place where the wrongful act occurs, and not by the law of the place where the action is commenced.¹² The same is true as to a release executed by the deceased or by a beneficiary.¹³

Sec. 1394. When existence of kin must be shown.—The American statutes on death by wrongful act may be divided into two general classes, as will be seen in the discussion of the measure of damages in such cases. The first class is where a right of action is given for the benefit of the next of kin or certain designated beneficiaries. The second class is where the right of recovery is given generally to the personal representative of the deceased, or for the benefit of his estate. In the first class of cases it is essential that it should be averred in the declaration, and proven, that there are next of kin surviving the deceased, who, under the law regulating the distribution of his assets, would be entitled to them, and on whose behalf the action is brought.¹⁴ In the second class of cases, as

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| Vining, 27 Ind. 513; Indianapolis St. R'y. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. Rep. 971; Reilly v. Railroad Co., 94 Mo. 600, 7 S. W. Rep. 407; Tucker v. Draper, 62 Neb. 66, 86 N. W. Rep. 917, 54 L. R. A. 321; Davis v. Railroad Co., 136 N. C. 115, 48 S. E. Rep. 591; Railway Co. v. Snyder, 24 Ohio St. 670; Cleveland, etc. Co. v. Workman, 66 Ohio St. 509, 54 N. E. Rep. 582, 90 Am. St. Rep. 602; Wolf v. Railroad Co., 55 Ohio St. 517, 45 N. E. Rep. 708, 36 L. R. A. 812; Glasser v. Railway Co., 57 Penn. St. 172; Missouri, etc. R'y. Co. v. Evans, 16 Tex. Civ. App. 68, 41 S. W. Rep. 80. | <p>10. Pisano v. Shanley Co., 66 N. J. L. 1, 48 Atl. Rep. 618.</p> <p>11. Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385; Wolf v. Railroad Co., 55 Ohio St. 517, 45 N. E. Rep. 708, 36 L. R. A. 812.</p> <p>12. Louisville, etc. R. R. Co. v. Whitlow, 19 Ky. L. R. 1931, 43 S. W. Rep. 711, 41 L. R. A. 614.</p> <p>13. Cowen v. Ray, 108 Fed. 320, 47 C. C. A. 352.</p> <p>14. Webster v. Min. Co., 137 Cal. 399, 70 Pac. Rep. 276, 92 Am. St. Rep. 181; Lamphear v. Buckingham, 33 Conn. 237; Kansas City R'y. Co. v. Miller, 2 Colo. 442; Willis Coal, etc., Co. v. Grizzell, 198 Ill. 313, 65 N. E. Rep. 74, revers-</p> |
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the action is not brought for the benefit of the next of kin, it would logically follow that no averment or proof of their existence need be made.¹⁵ The same result also follows if the statute provides for the disposition of the amount recovered when there are no next of kin.¹⁶

ing 100 Ill. App. 480; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. Rep. 875; *Stewart v. Railroad Co.*, 103 Ind. 44, 2 N. E. Rep. 208; *Dillier v. Railway Co.*, 34 Ind. App. 32, 72 N. E. Rep. 271; *Chicago, etc., R. R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. Rep. 166; *Duzan v. Myers*, 30 Ind. App. 227, 65 N. E. Rep. 1046, 96 Am. St. Rep. 341; *Mo. Pac. Ry. Co. v. Barber*, 44 Kan. 612, 24 Pac. Rep. 969; *Martin v. Mo. Pac. Ry. Co.*, 58 Kan. 475, 49 Pac. Rep. 605; *Oulighan v. Butler*, — Mass. —, 75 N. E. Rep. 726; *Barnum v. Railway Co.*, 30 Minn. 461, 16 N. W. Rep. 364; *Warren v. Englehart*, 13 Neb. 283, 13 N. W. Rep. 401; *Gottlieb v. Railway Co.*, 71 N. J. L. 47, 58 Atl. Rep. 1088; *Lilly v. Railroad Co.*, 32 S. C. 142, 10 S. E. Rep. 932; *Southern Railway Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. Rep. 1137; *East Tennessee, etc., Railway Co. v. Lilly*, 90 Tenn. 563, 18 S. W. Rep. 243; *Geroux v. Graves*, 62 Vt. 280, 19 Atl. Rep. 987; *Wiltse v. Town of Tilden*, 77 Wis. 152, 46 N. W. Rep. 234; *Hubbard v. Railway Co.*, 104 Wis. 160, 80 N. W. Rep. 454, 76 Am. St. Rep. 855.

Where the statute gives a right of action to one class in the event that there are none of a certain preferred class in existence, the fact that there are none such must be alleged and proved. *McIntosh v. Railway Co.*, 103 Mo. 131, 15 S.

W. Rep. 80; *Sparks v. Railroad Co.*, 31 Mo. App. 111; *Barker v. Railroad Co.*, 91 Mo. 86.

15. *Lexington, etc., Min. Co. v. Huffman*, 17 Ky. L. R. 775, 32 S. W. Rep. 611; *Perham v. Electric Co.*, 33 Ore. 451, 53 Pac. Rep. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799.

16. *Warner v. Railroad Co.*, 94 N. C. 250; *Baltimore, etc., R. R. Co. v. Wightman*, 29 Gratt. 431; *Madden v. Railway Co.*, 28 W. Va. 610.

This section in the second edition of *Hutchinson on Carriers* was as follows:

"§ 788. *Existence of kin must be shown.*—And it is essential that it should be averred in the declaration, and proven, that there are next of kin surviving the deceased, who, under the law regulating the distribution of his assets, would be entitled to them, and on whose behalf the action is brought. Hence if the husband, not being of the next of kin of the wife, and the statute not having made any provision for his benefit in case of her death by the negligent act of a wrong-doer, as her administrator, bring an action under it, his loss cannot enter into the estimate of the damages, and he can recover only for the pecuniary injury sustained by the next of kin. So where a father, as administrator of his deceased son, sued under the statute for his own benefit

Sec. 1395. Who included among beneficiaries — Aliens — Posthumous and illegitimate children—Grandchildren.—In the majority of states the action may be brought for the benefit of aliens¹⁷ as well as for the benefit of those who are

as sole next of kin, his mental anguish as a parent, and the loss of his son's society, were excluded from consideration, and he was allowed to recover only the pecuniary damages he sustained as next of kin. And where the widow of the decedent sued as administratrix for the benefit of herself and a minor child, the loss of support caused by the death was held to be not only a proper but a controlling consideration in fixing the amount of pecuniary loss sustained. In such cases, although there could have been no claim upon the deceased had he survived, as a legal right, yet the damages could be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life; of which the jury were to judge from all the circumstances. But in these actions brought under the statute, the mental suffering or loss of society resulting to the next of kin by reason of the death, which constitute the *solatium* of the Scotch law, are not to be considered in estimating the damages. Where the statute gives a right of action to one class in the event that there are none of a certain preferred class in existence, the fact that there are none such must be alleged and proved." As thus stated it was incorrect through a failure to recognize the distinction between statutes where the right

of action is given for the benefit of the next of kin or certain designated beneficiaries and statutes where the right of recovery is given generally to the personal representative of the deceased, or for the benefit of his estate.

17. There is some conflict of authority upon this point, but the majority of the following cases uphold the rule stated in the text. A few are *contra*.

Davidson v. Hill, (1901) 2 K. B. 606, 70 L. J. K. B. 788; Luke v. Calhoun, 52 Ala. 115; Bonthrow v. Phoenix, etc., Co., — Ariz. —, 71 Pac. Rep. 941, 61 L. R. A. 563; Szymanski v. Blumenthal, 3 Penne. 558, 52 Atl. Rep. 347; Railway Co. v. Glover, 92 Ga. 132, 18 S. E. Rep. 406; Kellyville v. Petraytis, 195 Ill. 215, 63 N. E. Rep. 94; 88 Am. St. Rep. 191; Cleveland, etc., Ry. Co. v. Osgood, — Ind. App. —, 73 N. E. Rep. 285, reversing 70 N. E. Rep. 839; Memphis & C. Packet Co. v. Pikey, 142 Ind. 304; 40 N. E. Rep. 527; Rietveld v. Wabash R. Co., — Iowa—, 105 N. W. Rep. 515; Romano v. Capital, etc., Co., 125 Iowa 591, 101 N. W. Rep. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; Trotta's Adm'r v. Johnson, Briggs & Pitts, — Ky. L. R. —, 90 S. W. Rep. 540; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. Rep. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934; Renlund v. Mining Co., 89 Minn. 41, 93 N. W. Rep. 1057, 99 Am. St. Rep. 534; Swanson v. Oakes, 93 Minn. 404,

residents of the state by whose law a right of recovery is given. And when a "child" or "children" of the deceased are named in a statute as beneficiaries, a recovery may be had for the benefit of posthumous children.¹⁸ But no recovery can be had under such a statute for the benefit of grandchildren,¹⁹ nor for illegitimate children,²⁰ nor for the parent of an adopted child.²¹

Sec. 1396. Effect of time limitation.—A limitation of time within which the right of action may be enforced relates not merely to the remedy, but to the right which the statute creates. It is a condition attached to the right to sue at all, and the right is lost if the time is disregarded.²² An exten-

101 N. W. Rep. 949; *Alfson v. Bush* Co., 182 N. Y. 393, 75 N. E. Rep. 230, *affirming* 89 N. Y. Supp. 1100, 97 App. Div. 632; *Tanas v. Municipal Gas. Co.*, 84 N. Y. Supp. 1053; *Lang v. Houston, etc., Co.*, 27 N. Y. Supp. 90; *affirmed*, 144 N. Y. 717, 39 N. E. Rep. 858; *Pittsburgh, etc., Ry. Co. v. Naylor*, — Ohio St. —, 76 N. E. Rep. 505; *Deni v. Railroad Co.*, 181 Pa. St. 525, 37 Atl. Rep. 558, 59 Am. St. Rep. 676; *Pocahontas Collieries Co. v. Rukas' Adm'r*, — Va. —, 51 S. E. Rep. 449; *McMillan v. Spider Lake, etc., Co.*, 115 Wis. 332, 91 N. W. Rep. 979, 95 Am. St. Rep. 947, 60 L. R. A. 589; *Robertson v. Railway Co.*, 122 Wis. 66, 99 N. W. Rep. 433; *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438; *Vetaloro v. Perkins*, 101 Fed. 393.

18. *Gorman v. Budlong*, 23 R. I. 169, 49 Atl. 704; *Railway Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. Rep. 1051; *Railway Co. v. Robertson*, 82 Tex. 657, 17 S. W. Rep. 1041, 27 Am. St. Rep. 929. But see *Daubert v. Western Meat Co.*, 139 Cal. 480, 73 Pac. Rep. 244, 96 Am. St. Rep. 154.

19. *Walker v. Railway Co.*, 110 La. 718, 34 So. Rep. 749; *Dallas, etc., Ry. Co. v. Elliott*, 7 Tex. Civ. App. 216, 26 S. W. Rep. 455.

20. *Dickinson v. Northeastern R. Co.*, 2 Hurl. & Colt. 735, 9 L. T. (N. S.) 299; *Robinson v. Railroad Co.*, 117 Ga. 168, 43 S. E. Rep. 452, 60 L. R. A. 555; *McDonald v. Pittsburgh, etc., R. Co.*, 144 Ind. 459, 43 N. E. Rep. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309; *McDonald v. Railway Co.*, 71 S. C. 352, 51 S. E. Rep. 138. *Contra*, *Muhl v. Railway Co.*, 10 Ohio St. 276. No averment of legitimacy is necessary by mother who is suing for death of her son. *L. & N. R. R. Co. v. Thomas*, — Miss. —, 40 So. Rep. 257.

21. *Heidecamp v. Railway Co.*, 69 N. J. L. 284, 55 Atl. Rep. 239.

22. *Poff v. New England, etc., Co.*, 72 N. H. 164, 55 Atl. Rep. 891; *Case v. Min. Co.*, 103 Mo. App. 477, 78 S. W. Rep. 62; *Best v. Town of Kinston*, 106 N. C. 205, 10 S. E. Rep. 997; *Hill v. New Haven*, 37 Vt. 501; *Williams v. Steamship Co.*, 126 Fed. 591.

But see *Wall v. Railroad*, 200 Ill.

sion of the period of limitation in a subsequent statute, therefore, will not affect an existing right of action.²³ Under such a limitation, the time begins to run at the death²⁴ according to the weight of authority.

The time limitation in the statute giving the right of action will control, no matter in what forum the action is brought.²⁵ But if no time limitation exists in that statute, then the statute of limitations of the forum governs.²⁶

Sec. 1397. Measure of damages.—The measure of damages in actions under these statutes depends to a great extent upon the nature of the statute itself. If the statute is a survival statute, the measure of damages is determined as in ordinary actions for personal injuries. If, however, a new cause of action is created, then regard must be had to a division

66, 65 N. E. Rep. 632, *reversing* 101 Ill. App. 431; *Stephan v. Railway Co.*, 106 Ill. App. 13; *Dennis v. Railroad Co.*, 70 S. C. 254, 49 S. E. Rep. 869, 106 Am. St. Rep. 746.

23. *Pittsburg, etc., Ry. Co. v. Hine*, 25 Ohio St. 629.

24. *Louisville, etc., Railroad Co. v. Robinson*, 141 Ala. 325, 37 So. Rep. 431; *Radejky v. Sargent*, 77 Conn. 110, 58 Atl. Rep. 709; *Western Railroad Co. v. Bass*, 104 Ga. 390, 30 S. E. Rep. 874; *Lake Shore, etc., Ry. Co. v. Dylinski*, 67 Ill. App. 114; *Rodman v. Mo. Pac. Ry. Co.*, 65 Kan. 645, 70 Pac. Rep. 642, 59 L. R. A. 704; *Goodwin v. Lumber Co.*, 109 La. 1050, 34 So. Rep. 74; *St. Paul Trust Co. v. Sargent*, 44 Minn. 449, 47 N. W. Rep. 51; *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. Rep. 131; *Robinson v. Min. Co.*, 26 Wash. 484, 67 Pac. Rep. 274; *Hoover v. Railway Co.*, 46 W. Va. 268, 33 S. E. Rep. 224; *Railroad Co. v. Clarke*, 152 U. S. 230, 14 Sup. Ct. R. 579.

But see *Louisville, etc., R. R. Co.*

v. Sanders, 86 Ky. 259, 5 S. W. Rep. 563, 9 Ky. L. R. 690 and *Crapo v. City of Syracuse*, — N. Y. —, 76 N. E. Rep. 465, *reversing* 90 N. Y. Supp. 553, 98 App. Div. 376.

25. *Northern Pac. R'y Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. R. 978, 38 L. Ed. 958; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. R. 140, 30 L. Ed. 358; *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996; *Railroad Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Theroux v. Northern Pac. Ry. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Weaver v. R. R. Co.*, 21 App. D. C. 499; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106; *Negaubauer v. Railway Co.*, 92 Minn. 184, 99 N. W. Rep. 620, 104 Am. St. Rep. 674; *Cavanaugh v. Nav. Co.*, 13 N. Y. Supp. 540; *Dailey v. Railway Co.*, 26 Misc. 539, 57 N. Y. Supp. 485; *Dennis v. R. R. Co.*, 70 S. C. 254, 49 S. E. Rep. 869.

26. *Munos v. So. Pac. Co.*, 51 Fed. 188, 2 C. C. A. 163.

of the statutes according to the beneficiaries. Where a right of recovery is given generally to the personal representative of the deceased, or for the benefit of his estate, the damages are such a sum as the deceased would probably have earned in his business during his life and left as his estate, taking into consideration the age of the deceased, his ability and disposition to labor, and habits of living and expenditures. But where a new cause of action is created for the benefit of the next of kin or certain designated beneficiaries, the damages are the pecuniary loss sustained by those who are entitled under the statute to the benefits derived from the action. The latter is the rule adopted in the majority of states. It would be necessary to go far beyond the scope of this work to go into all the cases on this subject in detail, but for the convenience of the practitioner a sufficient number of citations are given below to indicate the trend of the decisions in the various states.²⁷

27. England: *Blake v. Midland R. Co.*, 18 Q. B. 93, 21 L. J. Q. B. 233; *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 32 L. J. Q. B. 377.

Alabama: In Alabama under section 2589 of the Code, (Sec. 27, Code of 1896) the damages are punitive, its purpose being the preservation of human life, regardless of the pecuniary value of a particular life to next of kin under statutes of distribution, and the admeasurement of recovery must be by reference alone to the quality of the wrongful act or omission. *Louisville, etc., R. R. Co. v. Tegnor*, 125 Ala. 593, 28 So. Rep. 570; *Richmond & D. R. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800; *East Tennessee, etc., R. R. Co. v. King*, 81 Ala. 177, 2 So. Rep. 152.

Under the Employers Act in Alabama, (Section 2591 of Code) the recovery is usually the pecuniary

loss suffered. *McGhee v. Willis*, 134 Ala. 456, 32 So. Rep. 301; *L. & N. R. R. Co. v. Banks*, 132 Ala. 471, 31 So. Rep. 573; *L. & N. R. R. Co. v. Jones*, 130 Ala. 456, 30 So. Rep. 586; *Tutwiler Coal, Coke & Iron Co. v. Enslen*, 129 Ala. 336, 30 So. Rep. 600; *Decatur Car Wheel, etc., Co. v. Mehaffey*, 128 Ala. 242, 29 So. Rep. 646; *Central of Georgia Ry. Co. v. Alexander*, — Ala. —, 40 So. Rep. 424; *Reiter-Conley Mfg. Co. v. Hamlin*, — Ala. —, 40 So. Rep. 281; *Central Foundry Co. v. Bennett*, — Ala. —, 39 So. Rep. 574.

But there may be a recovery for wantonness, or intentional wrong. *L. & N. R. R. Co. v. York*, 128 Ala. 305, 30 So. Rep. 676.

Arkansas: *St. Louis, etc., Ry. Co. v. Mathis*, — Ark. —, 91 S. W. Rep. 763; *St. Louis, etc., Ry. Co. v. Garner*, — Ark. —, 89 S. W. Rep. 550; *St. Louis, etc., Ry.*

“The word ‘pecuniary,’ when it occurs in statutes, is not used in a sense of the immediate loss of money or property. It

Co. v. Cleere, — Ark. —, 88 S. W. Rep. 995; St. Louis, etc., Ry. Contracting Co., — Conn. —, 60 Atl. Rep. 115.

Co. v. Hitt, — Ark. —, 88 S. W. Rep. 908, 990; Railway Co. v. Haist, 71 Ark. 258, 72 S. W. Rep. 893, 100 Am. St. Rep. 65, 893; St. Louis, etc., Ry. Co. v. Sweet, 60 Ark. 550, 31 S. W. Rep. 571; Railway Co. v. Maddry, 57 Ark. 306, 21 S. W. Rep. 472; St. Louis, etc., Ry. Co. v. Davis, 55 Ark. 462, 18 S. W. Rep. 628; Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296. *Delaware*: Neal v. Railroad Co., 3 Penne. 467, 53 Atl. Rep. 338; Reed v. Railroad Co., 4 Penne. 413, 57 Atl. Rep. 529; Williams v. Walton & Whann Co., 9 Houst. 322, 32 Atl. Rep. 726; Quinn v. Johnson Forge Co., 9 Houst. 338; McFeat v. Philadelphia, etc., R. Co. (Del.), 62 Atl. Rep. 898.

California: Powley v. Swensen, 146 Cal. 471, 80 Pac. Rep. 722; Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. Rep. 991; Dyas v. Southern Pac. Co., 140 Cal. 296, 73 Pac. Rep. 972; Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 Pac. Rep. 163; Redfield v. St. R. Co., 110 Cal. 277, 42 Pac. Rep. 822; Nehrbas v. Railroad Co., 62 Cal. 320; Cook v. Railroad Co., 60 Cal. 604; Ruppel v. United Railroads, 1 Cal. App. 666, 83 Pac. Rep. 1073; The Dauntless, 121 Fed. 420.

Florida: Duval v. Hunt, 34 Fla. 85, 15 So. Rep. 876; Railway Co. v. Foxworth, 41 Fla. 1, 25 So. Rep. 338, 79 Am. St. Rep. 149; Florida Cent., etc., Ry. Co. v. Foxworth, — Fla. —, 34 So. Rep. 270; Florida Cent., etc., Ry. Co. v. Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; Callison v. Brake, 129 Fed. 196, 63 C. C. A. 354, affirming Brake v. Callison, 122 Fed. 722; Louisville & N. R. Co. v. Jones, — Fla. —, 39 So. Rep. 485.

Colorado: Denver, etc., R. R. Co. v. Gunning, 33 Colo. 280, 80 Pac. Rep. 727; Pierce v. Conners, 20 Colo. 178, 46 Am. St. Rep. 279, 37 Pac. Rep. 721; Railroad Co. v. Spencer, 61 Pac. Rep. 606, 27 Colo. 313, 51 L. R. A. 151.

Connecticut: Tomlinson v. Derby, 43 Conn. 562; Taylor v. Monroe, 43 Conn. 42; Broughel v. Tel. Co., 73 Conn. 614, 48 Atl. Rep. 751, 84 Am. St. Rep. 176; s. c. 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 406; Hesse v. Tramway Co., 75 Conn. 571, 54 Atl. Rep. 299; Rincicotti v. *Georgia*: Savannah, etc., R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. Rep. 471, 14 Am. St. Rep. 183; Central of Georgia Ry. Co. v. Hensen, 121 Ga. 462, 49 S. E. Rep. 278; Railway Co. v. Glover, 92 Ga. 132, 18 S. E. Rep. 406; Perry v. Banking Co., 85 Ga. 193; Savannah Electric Co. v. Bell, — Ga. —, 53 S. E. Rep. 109.

Idaho: Holt v. Railroad Co., 3 Idaho, 703, 35 Pac. Rep. 39.

Illinois: Ill. Cent. R. R. Co. v.

looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from

- Johnson, 221 Ill. 42, 77 N. E. Rep. 592; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. Rep. 1081, *affirming* 113 Ill. App. 435; Chicago, etc., R. R. Co. v. Beaver, 199 Ill. 34, 65 N. E. Rep. 144; O'Fallon, etc., Co. v. Laquet, 198 Ill. 125, 64 N. E. Rep. 767; Cleveland, etc., Ry. Co. v. Keenan, 190 Ill. 217, 60 N. E. Rep. 107; Economy Light, etc., Co. v. Stephen, 187 Ill. 137, 58 N. E. Rep. 359; Cleveland, etc., Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. Rep. 965; Ohio & M. Ry. Co. v. Wangelin, 152 Ill. 138, 38 N. E. Rep. 760; Pennsylvania Co. v. Keane, 143 Ill. 172, 32 N. E. Rep. 260, *affirming* 41 Ill. App. 317; Joliet v. Weston, 123 Ill. 641; Holton v. Daly, 106 Ill. 131; Rockford, etc., Ry. Co. v. Delaney, 82 Ill. 198; Chicago, etc., R. R. Co. v. Harwood, 80 Ill. 88; Chicago Bridge & Iron Co. v. La Mantia, 112 Ill. App. 43; Chicago, etc., Ry. Co. v. Root, 106 Ill. App. 164.
- Indiana:* Consolidated Stone Co. v. Staggs, 164 Ind. 331, 73 N. E. Rep. 695; Cleveland, etc., Ry. Co. v. Miles, 162 Ind. 646, 70 N. E. Rep. 985; Malott v. Shimer, 153 Ind. 35, 74 Am. St. Rep. 278, 54 N. E. Rep. 101; Lake Erie, etc., Ry. Co. v. Magg, 132 Ind. 168, 31 N. E. Rep. 564; Pennsylvania Co. v. Lilly, 73 Ind. 254; Smith v. M. C. R. Co., — Ind. —, 73 N. E. Rep. 928; Southern Ind. Ry. Co. v. Moore, 34 Ind. App. 154, 71 N. E. Rep. 516, 72 N. E. Rep. 479; s. c. 29 Ind. App. 52, 63 N. E. Rep. 863; Railway Co. v. Drumm, 32 Ind. App. 547, 70 N. E. Rep. 286; Duzan v. Myers, 30 Ind. App. 227, 65 N. E. Rep. 1046, 96 Am. St. Rep. 341.
- Iowa:* Gregory v. Railroad Co., 126 Iowa, 230, 101 N. W. Rep. 761; *In re Cook's Estate*, 126 Iowa, 158, 101 N. W. Rep. 747; Hively v. Webster Co., 117 Iowa, 672, 91 N. W. Rep. 1041; Spaulding v. R. R. Co., 98 Iowa, 205, 67 N. W. Rep. 227; Lowe v. Railway Co., 89 Iowa, 420, 56 N. W. Rep. 519; Wheelan v. Railway Co., 85 Iowa, 167, 52 N. W. Rep. 119; Van Gent v. Railway Co., 80 Iowa, 526, 45 N. W. Rep. 913; Donaldson v. Railroad Co., 18 Iowa, 280.
- Kansas:* Kan. Pac. Ry. Co. v. Cutter, 19 Kan. 83; Atchison, etc., Ry. Co. v. Townsend, — Kan. —, 81 Pac. Rep. 205; Railway Co. v. Moffatt, 60 Kan. 113, 55 Pac. Rep. 837, 72 Am. St. Rep. 343; Union Pac. R. R. Co. v. Dunden, 37 Kan. 1; Atchison, etc., R. Co. v. Weber, 33 Kan. 543, 6 Pac. Rep. 877, 52 Am. Rep. 543; Fidelity Land. & Imp. Co. v. Buzzard, 69 Kan. 330, 76 Pac. Rep. 832; Missouri, etc., Ry. Co. v. McLaughlin, — Kan. —, 84 Pac. Rep. 989.
- Kentucky:* Railroad Co. v. Mulfinger's Adm'x, 26 Ky. L. R. 3, 80 S. W. Rep. 499; Railroad Co. v. Sullivan's Adm'x, 25 Ky. L. R. 854, 76 S. W. Rep. 525; Railway in Kentucky v. Otis' Adm'r, 25 Ky. L. R. 1686, 78 S. W. Rep. 480; Smith v. Middleton, 112 Ky. 588, 66 S. W. Rep. 388, 100 Am. St. Rep. 308; Louisville, etc., R. R. Co. v. Tucker, 23 Ky. L. R. 1929, 65 S. W. Rep. 453; Southern Ry. Co. v. Evans, 23 Ky. L. R. 568, 63

whom they would have proceeded. It is used in distinction to injuries to the sentiments which arise from the death of rela-

S. W. Rep. 445; Louisville, etc., R. R. Co. v. Creighton, 106 Ky. 42, 50 S. W. Rep. 227, 20 Ky. L. R. 1691; Railroad Co. v. Eakin's Adm'r, 103 Ky. 465, 45 S. W. Rep. 529; Louisville, etc., R. R. Co. v. Case, 9 Bush. 728.

Louisiana: Eichorn v. New Orleans, etc., Co., 114 La. 712, 38 So. Rep. 526; s. c. 112 La. Ann. 236, 36 So. Rep. 335; Hamilton v. Company, 42 La. Ann. 824, 8 So. Rep. 586; Vredenburg v. Behan, 33 La. Ann. 627; Towns v. Railroad Co., 37 La. Ann. 630, 55 Am. Rep. 508.

Maine: Oakes v. Maine R. R. Co., 95 Me. 103, 49 Atl. Rep. 418; McKay v. Dredging Co., 92 Me. 454, 43 Atl. Rep. 29; McCarthy v. Clafin, 99 Me. 290, 59 Atl. Rep. 293.

Maryland: Western Maryland R. Co. v. State, 95 Md. 537, 53 Atl. Rep. 969; Railroad Co. v. State, 81 Md. 371, 32 Atl. Rep. 201; United Electric, etc., Co. v. State, — Md. —, 60 Atl. Rep. 248.

Massachusetts: Baldwin v. Railroad Corp., 4 Gray, 333; Oulighan v. Butler, — Mass. —, 75 N. E. Rep. 726.

Michigan: McDonald v. Champion Iron & Steel Co., — Mich. —, 103 N. W. Rep. 829; Olivier v. Railway Co., 134 Mich. 367, 96 N. W. Rep. 434, 104 Am. St. Rep. 607; Rouse v. Electric Railway Co., 128 Mich. 149, 87 N. W. Rep. 68; Walker v. Railway Co., 104 Mich. 617, 62 N. W. Rep. 1032; s. c. 111 Mich. 521, 69 N. W. Rep. 1114; Nelson v. Railway Co., 104 Mich. 582, 62 N. W. Rep. 993; Richmond v. Railroad Co., 87 Mich. 374, 49

N. W. Rep. 621; Van Brunt v. Railroad Co., 78 Mich. 530, 44 N. W. Rep. 321; Hurst v. City Ry. Co., 84 Mich. 539; Cooper v. Railway Co., 66 Mich. 271.

Minnesota: Gunderson v. Elevator Co., 47 Minn. 161, 49 N. W. Rep. 694; Shaber v. Railway Co., 28 Minn. 103, 9 N. W. Rep. 575; Scheffler v. Railway Co., 32 Minn. 518, 21 N. W. Rep. 711; Robel v. Railway Co., 35 Minn. 84, 27 N. W. Rep. 305; Bolinger v. Railway Co., 36 Minn. 418, 31 N. W. Rep. 856; Hutchins v. Railway Co., 44 Minn. 5, 46 N. W. Rep. 79; State v. Probate Court of Dakota Co., 51 Minn. 241, 53 N. W. Rep. 463; Sykora v. Case, etc., Co., 59 Minn. 130, 60 N. W. Rep. 1008; Sieber v. Railway Co., 76 Minn. 269, 79 N. W. Rep. 95; Foot v. Railway Co., 81 Minn. 493, 84 N. W. Rep. 342, 83 Am. St. R. 395; Swift & Co. v. Johnson, — C. C. A. —, 138 Fed. 867; Swanson v. Oakes, 93 Minn. 404, 101 N. W. Rep. 949.

Mississippi: Illinois Cent. R. R. Co. v. Cruduf, 63 Miss. 291; Mobile, etc., R. R. Co. v. Watly, 69 Miss. 145, 13 So. Rep. 825.

Missouri: Haehl v. Railroad Co., 119 Mo. 325, 24 S. W. Rep. 737; Barth v. Railway Co., 142 Mo. 535, 44 S. W. Rep. 778; Jones v. Railroad Co., 178 Mo. 528, 77 S. W. Rep. 890; Dunn v. Railroad Co., 21 Mo. App. 84; Matthews v. Railway Co., 26 Mo. App. 84.

Montana: Soyer v. Great Falls Water Co., 15 Mont. 1, 37 Pac. Rep. 838.

Nebraska: Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. Rep. 840;

Railroad Co. *v.* Roeser, — Neb. —, 95 N. W. Rep. 68; Railway Co. *v.* Baier, 37 Neb. 235, 55 N. W. Rep. 913; Railroad Co. *v.* Hambel, 2 Neb. (unofficial) 607, 89 N. W. Rep. 643; Railway Co. *v.* Young, 58 Neb. 678, 79 N. W. Rep. 556; Railroad Co. *v.* Crow, 54 Neb. 747, 74 N. W. Rep. 1066, 69 Am. St. Rep. 741; Railway Co. *v.* Lagerkraus, 65 Neb. 566, 91 N. W. Rep. 358, 95 N. W. Rep. 2.

New Hampshire: Emery *v.* Railroad Co., 67 N. H. 434, 36 Atl. Rep. 367; Dillon *v.* Railway Co., — N. H. —, 62 Atl. Rep. 93; Yeaton *v.* R. R. Co., — N. H. —, 61 Atl. Rep. 522.

New Jersey: May *v.* Railroad Co., 62 N. J. L. 63, 42 Atl. Rep. 163; Graham *v.* Traction Co., 64 N. J. L. 10, 44 Atl. Rep. 964; Fleming *v.* Lobel, — N. J. —, 59 Atl. Rep. 27; Telfer *v.* Railroad Co., 30 N. J. L. 188; Ferguson *v.* Telephone Co., 71 N. J. L. 59, 58 Atl. Rep. 74; Hackney *v.* Telephone Co., 69 N. J. L. 335, 55 Atl. Rep. 252.

New Mexico: Cerrillos Coal R. Co. *v.* Deserant, 9 N. Mex. 49, 49 Pac. Rep. 807.

New York: Sternfels *v.* St. R. Co., 174 N. Y. 512, 66 N. E. Rep. 1117, *affirming* 77 N. Y. Supp. 309, 73 App. Div. 494; Countryman *v.* Railroad Co., 166 N. Y. 201, 59 N. E. Rep. 822, 82 Am. St. Rep. 640; Meekin *v.* Railroad Co., 164 N. Y. 152, 58 N. E. Rep. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635; Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 17 N. E. Rep. 108; Johnson *v.* Railroad Co., 80 Hun, 306, 30 N. Y. Supp. 318; *affirmed*, 144 N. Y. 719, 39 N. E. Rep. 857; Austin *v.* Met. St. R. Co., 95 N. Y.

Supp. 740, 108 App. Div. 249; Gilligan *v.* Railroad Co., 1 E. D. Smith, 453.

North Carolina: Watson *v.* Railroad Co., 133 N. C. 188, 45 S. E. Rep. 555; McLamb *v.* Railroad Co., 122 N. C. 862, 29 S. E. Rep. 894; Benton *v.* Railroad Co., 122 N. C. 1007, 30 S. E. Rep. 333; Byrd *v.* Southern Express Co., 139 N. C. 273, 51 S. E. Rep. 851; Carter *v.* Railroad Co., 139 N. C. 499, 52 S. E. 643, 138 N. C. 750, 52 S. E. Rep. 642; Cooper *v.* Railroad Co., — N. C. —, 52 S. E. Rep. 932.

North Dakota: Haug *v.* Railway Co., 8 N. Dak. 23, 77 N. W. Rep. 97, 42 L. R. A. 664.

Ohio: Steel *v.* Kurtz, 28 Ohio St. 191; Railroad Co. *v.* Holtman, 25 O. C. C. 140.

Oregon: Carlson *v.* Railway Co., 21 Ore. 450, 28 Pac. Rep. 497; Skottowe *v.* Railway Co., 22 Ore. 430, 30 Pac. Rep. 222, 16 L. R. A. 593.

Pennsylvania: Blauvelt *v.* Railroad Co., 206 Pa. 141, 55 Atl. Rep. 857; Hoon *v.* Traction Co., 204 Pa. St. 369, 54 Atl. Rep. 270; Stahler *v.* Railway Co., 199 Pa. St. 383, 49 Atl. Rep. 273, 85 Am. St. Rep. 791; McHugh *v.* Schlosser, 159 Pa. St. 486, 28 Atl. Rep. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699; Lehigh Iron Co. *v.* Rupp, 100 Pa. 99; Mansfield Coal, etc., Co. *v.* McEnery, 91 Pa. St. 189, 36 Am. Rep. 662; Pennsylvania Co. *v.* Butler, 57 Pa. 335; Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315; Pennsylvania R. Co. *v.* Zebe, 33 Pa. St. 318.

Rhode Island: McCabe *v.* Narragansett, etc., Co., — R. I. —, 61 Atl. Rep. 667; s. c. 26 R. I. 427, 59 Atl. Rep. 112; Reynolds *v.* Nar-

ragansett, etc., Co., — R. I. —, 59 Atl. Rep. 393.

South Carolina: Garrick v. Railroad Co., 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. Rep. 334.

South Dakota: Smith v. Ry. Co., 6 S. Dak. 583, 62 N. W. Rep. 967, 28 L. R. A. 573.

Tennessee: Davidson Benedict Co. v. Severson, 109 Tenn. 572, 72 S. W. Rep. 967 (this case contains a resumé of all preceding cases in Tennessee on this subject); Railroad Co. v. Bentz, 108 Tenn. 670, 69 S. W. Rep. 317, 91 Am. St. Rep. 763; Ill. Cent. R. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. Rep. 296; Louisville, etc., R. R. Co. v. Burke, 6 Coldw. 45.

Texas: San Antonio, etc., Ry. Co. v. Long, 87 Tex. 148, 21 S. W. Rep. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637; Galveston, etc., Ry. Co. v. Worthy, 87 Tex. 459, 29 S. W. Rep. 376; McGown v. Railroad Co., 85 Tex. 289, 20 S. W. Rep. 80; Railway Co. v. Robertson, 82 Tex. 657, 27 Am. St. Rep. 929, 17 S. W. Rep. 1041; Mo. Pac. Ry. Co. v. Henry, 75 Tex. 220; Houston, etc., Ry. Co. v. Cowser, 57 Tex. 293; Galveston, etc., Ry. Co. v. Matula, 79 Tex. 581, 15 S. W. Rep. 573; Texas, etc., Ry. Co. v. Geiger, 79 Tex. 13, 15 S. W. Rep. 214; St. Louis, etc., Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. Rep. 104; Paschall v. Owen, 77 Tex. 585, 14 S. W. Rep. 203; Texas, etc., Ry. Co. v. Lester, 75 Tex. 56; Galveston, etc., Ry. Co. v. Currie (Tex. Civ. App.), 91 S. W. Rep. 1100; Galveston, etc., Ry. Co. v. Heard (Tex. Civ. App.), 91 S. W. Rep. 1100; International, etc., Ry. Co. v. Glover (Tex. Civ. App., 88 S. W. Rep. 515; Texas, etc., Lime

Co. v. Lee (Tex. Civ. App.), 82 S. W. 306; — Tex. —, 82 S. W. 1025; Galveston, etc., Ry. Co. v. Perry (Tex. Civ. App.), 85 S. W. Rep. 62; Missouri, etc., Ry. Co. v. O'Connor (Tex. Civ. App.), 78 S. W. Rep. 374.

Utah: Pool v. Railroad Co., 7 Utah, 303, 26 Pac. Rep. 654; Beaman v. Min. Co., 23 Utah, 139, 63 Pac. Rep. 631; Corbett v. Railroad Co., 25 Utah, 449, 71 Pac. Rep. 1065.

Vermont: Boyden v. Railroad Co., 70 Vt. 125, 39 Atl. Rep. 771; Lazelle v. Town of Newfane, 70 Vt. 440, 41 Atl. Rep. 511.

Virginia: Baltimore, etc., R. R. Co. v. Noell, 32 Gratt. 394; Matthews v. Warner's Adm'r, 29 Gratt. 570; Baltimore, etc., R. R. Co. v. Wightman's Adm'r, 29 Gratt. 431; Portsmouth St. R. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. Rep. 850; Norfolk, etc., Ry. Co. v. Cheatwood's Adm'r, 103 Va. 356, 49 S. E. Rep. 489.

Washington: Klepsch v. Donald, 4 Wash. 436, 30 Pac. Rep. 991, 31 Am. St. Rep. 936; Creamer v. Moran Bros. Co., — Wash. —, 84 Pac. Rep. 592; Halverson v. Electric Co., 35 Wash. 600, 77 Pac. Rep. 1058.

West Virginia: Searle's Adm'r v. Railroad Co., 32 W. Va. 370, 9 S. E. Rep. 248; Kelley v. Ohio River R. Co., — W. Va. —, 52 S. E. Rep. 520.

Wisconsin: Bauer v. Richter, 103 Wis. 412, 79 N. W. Rep. 404; Rudiger v. Railroad Co., 101 Wis. 292, 77 N. W. Rep. 169; Ewen v. Railroad Co., 38 Wis. 614; Tuteur v. Railroad Co., 77 Wis. 505, 46 N. W. Rep. 897; Mulcairns v.

tives, and excludes those losses which result from the deprivation of the society and companionship of relatives.'²⁸

Janesville, 67 Wis. 24; *Annas v. Railroad Co.*, 67 Wis. 46; *Schrier v. Railway Co.*, 65 Wis. 457.

28. *Duzan v. Myers*, 30 Ind. App. 227, 65 N. E. Rep. 1046, 96 Am. St. Rep. 341.

Probable duration of life of deceased is to be considered (*Schaffer v. Railway Co.*, 32 Minn. 518), and mortality tables may be used in estimating it. *Railroad v. Putnam*, 118 U. S. 554, 7 Sup. Ct. R. 1, 30 L. Ed. 257; *Nelson v. Lighting Co.*, 75 Conn. 548, 54 Atl. Rep. 303; *Copson v. Railroad Co.*, 171 Mass. 233, 50 N. E. Rep. 613; *Hunn v. Railroad Co.*, 78 Mich. 513; *Sauter v. Railroad*, 66 N. Y. 50, 23 Am. Rep. 18; *Reynolds v. Electric Lighting Co.*, — R. I. —, 59 Atl. Rep. 393; *St. Louis, etc., Ry. Co. v. Hitt*, — Ark. —, 88 S. W. Rep. 908, 990; *Emery v. Philadelphia*, 208 Pa. 492, 57 Atl. Rep. 977; *Norfolk & W. Ry. Co. v. Spencer's Adm'x*, — Va. —, 52 S. E. Rep. 310; *The Saginaw*, 139 Fed. 906.

Evidence that deceased had his life insured is immaterial. *Kellogg v. Railroad Co.*, 79 N. Y. 72; *North Penn. R. Co. v. Kirk*, 90 Penn. St. 15. So that defendant paid his funeral and sickness expenses. *Murray v. Usher*, 117 N. Y. 542.

Married woman's damages are not to be assessed as though she were unmarried. *Stutmuller v. Cloughly*, 58 Iowa, 738.

Remarriage of widow cannot be considered in abatement of damages. *Chicago, etc., R. R. Co. v. Driscoll*, 207 Ill. 9, 69 N. E. Rep.

620, *affirming* 107 Ill. App. 615; *Philpott v. Penn. R. R. Co.*, 175 Pa. St. 570, 34 Atl. Rep. 856.

Receipt of mortuary benefits by widow and next of kin not ground for abatement of damages. *I. C. R. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. Rep. 435, *affirming* 109 Ill. App. 468.

Savings of deceased will not decrease widow's recovery. *Sloss-Sheffield Steel & Iron Co. v. Holway*, — Ala. —, 40 So. Rep. 211.

It is no defense that prior to the death of her husband the wife had consulted an attorney as to a divorce. *Abel v. Traction Co.*, — Pa. —, 61 Atl. Rep. 915.

It is not proper to admit evidence of the pecuniary condition and resources of the widow or next of kin. *Pittsburgh, etc., Ry. Co. v. Kinnare*, 203 Ill. 388, 67 N. E. Rep. 826, *affirming* 105 Ill. App. 566.

Evidence of defendant's pecuniary circumstances is admissible only when exemplary damages are recoverable. *Morgan v. Durfee*, 69 Mo. 469.

Where a parent sues for the death of a son of full age, some evidence of pecuniary injury must be shown, as the parent would have no legal right to his services. *Winnt v. Railroad Co.*, 74 Tex. 32.

In estimating damages to children for death of parent, the nurture, instruction, and physical, moral and intellectual training they would have received, may be considered. *Searles v. Railroad*

Sec. 1398. No damages for mental suffering of beneficiaries.—In these actions the mental suffering or loss of

Co., 32 W. Va. 370. See, also, *McPherson v. Railroad Co.*, 97 Mo. 253. Loss of parent's care and training may be compensated. *Howard County v. Legg*, 93 Ind. 523. Prospective damages should be computed to their majority. *Baltimore, etc., Road Co. v. State*, 71 Md. 573.

Damages are reckoned from date of death and not from date of injury. *Atlanta, etc., R. Co. v. Venable*, 67 Ga. 697.

Necessary funeral expenses are elements of damage if any one for whose benefit action is brought is legally bound to pay them. *Murphy v. Railroad Co.*, 88 N. Y. 445.

In a case in Michigan (*Hurst v. City Ry. Co.*, 84 Mich. 539) it is said: "The statute provides that when a person is killed by negligence and pecuniary injury results, the right of action for such injury survives to the personal representatives. It clearly contemplates that pecuniary injury must result from the negligent act; and, therefore, to entitle a party to recover in such action, the negligence must not only be established, but also some pecuniary injury or loss must be shown by evidence. Such damages for the loss of prospective earnings are special in their character and must be specially pleaded, and a recovery can only be had upon evidence establishing the fact. *Pennsylvania Co. v. Lilly*, 73 Ind. 254; *Gilligan v. Railroad Co.*, 1 E. D. Smith, 453; *Baldwin v. Railroad Corp.*, 4 Gray, 333; *Tomlinson v. Derby*, 43 Conn. 562; *Taylor v. Monroe*, *id.* 42; *Dunn v.*

Railroad Co., 21 Mo. App. 205; *Matthews v. Railway Co.*, 26 Mo. App. 84; *Perry v. Banking Co.*, 85 Ga. 193; *Railway Co. v. Orr* (Ala.), 8 South. Rep. 363. There is no allegation of special damages in the declaration, and the declaration does not count upon the pecuniary loss of the prospective earnings of the intestate; the theory of the plaintiff being that no such allegation was necessary and no proofs required, but that the action was brought for the negligent killing and nothing else. It is necessary to a recovery in such cases that the pecuniary loss be alleged in the declaration and that some proof be introduced to establish the facts so alleged. It was said by Mr. Justice Champlin in *Cooper v. Railway Co.*, 66 Mich. at page 371: "The statute authorizes the jury in every case of this kind to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute the jury was not warranted in giving damages not founded upon the testimony or beyond the measure of compensation for the injury inflicted."

In *Chicago, etc., Ry. Co. v. Bayfield*, 37 Mich. 205, *Cooley, C. J.*, said:

"The damages recoverable in a case of this nature are by the statute to be assessed with reference 'to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person.' Com. L. § 2351.

society resulting to the next of kin by reason of the death, which constitute the *solatium* of the Scotch law, are not to be

They have no regard to the needs of the persons designated, or to any moral obligation which may have rested upon the deceased to supply their wants. If the moral obligation to support near relatives were to be the criterion, we might take their property into account as bearing upon the extent of this obligation; but as this may or may not have been recognized, and if recognized may have been very imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received or was likely to receive from the death. What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime; and to show that the family was poor had no tendency towards showing whether this was, or was likely to be, large or small. One man contributes liberally in aid of his poor relatives; another delights in contributing luxuries where comforts are already abundant; but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by a poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent whether the loser be rich or poor.

"A *dictum* in *Potter v. Chicago*, etc., R. W. Co., 21 Wis., 372, 375, implies that the pecuniary circum-

stances of the family may properly be taken into account by the jury. But if this is so, and their poverty should increase the damages, so should their wealth diminish them; and this would establish a rule of damages unknown to the statute and repugnant to the one named by it. There are, it is true, some cases in which perhaps such evidence must be received, because it tends to establish a moral obligation to demand assistance in the future from one at the time incapable of giving it; as where the person killed was a very young child and at present contributing nothing in aid of any one. *Ewen v. Chicago*, etc., R. W. Co., 38 Wis. 613; *Barley v. Chicago*, etc., R. R. Co., 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169. But it is a sort of evidence that, when necessarily received, should be used with caution.

"In *Dalton v. Southeastern R. W. Co.*, 4 C. B. (N. S.) 296, to which we are referred, the damages appear to have been measured, not by the circumstances of the family, but by an estimate very properly based on the customary contributions of the deceased. The same remark is substantially true of *Franklin v. Southeastern R. W. Co.*, 3 H. & N. 211. The wealth of the defendant, it is very justly held, can be no measure of the loss sustained (*Conant v. Griffin*, 48 Ill. 410), though it would seem to be quite as suitable for the consideration of the jury as the poverty of the next of kin. See *Pennsylvania*

R. R. Co. v. Zebe, 23 Penn. St. 318. His wealth and their poverty would make the like appeal to his generosity, but the response to the appeal would indicate the extent of the loss, not the appeal itself."

In *Ihl v. The Railroad*, 47 N. Y. 317, it was held that the absence of proof of special pecuniary damage resulting from the death, by the negligence of the defendant, of a child only three years old, would not justify the court in nonsuiting the jury to find only nominal damages. "It was," said the court, "within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages, with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services, had he lived. These calculations are for the jury; and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in

life of the parents, and other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion."

And in another case it was held that, while the jury must be satisfied that pecuniary loss had resulted to her children from the death of the mother by the defendant's negligence, yet, if so satisfied, they were at liberty to allow damages, from whatever source they actually proceeded which could produce them; and that if the jury were satisfied "from the history of the family or the intrinsic probabilities of the case, that they (damages) were sustained by the loss of bodily care, or intellectual culture, or moral training, which the mother in that case had before supplied," they, the jury, were at liberty to allow them. *McIntyre v. The Railroad*, 37 N. Y. 287. See, also, *Pym v. The Railway*, 4 Best & S. 396; *Tilley v. The Railroad*, 24 N. Y. 471; s. c. 29 N. Y. 252; *Railroad v. Welton*, 52 Ill. 290.

It has also been held in a number of cases, that while it must be shown that damages of a pecuniary nature have been sustained by those on whose behalf the action is brought, it need not be shown that they had a claim upon their deceased relative, for support or otherwise, which amounted to a legal right; as if they be brothers and sisters (*Railroad Company v. Barron*, 5 Wall. 90; *Penn. R. R. v. McClosky*, 23 Penn. St. 526; *Grotenkemper v. Harris*, 25 Ohio St. 510; *Paulmier v. The Railroad*, 5 Vroom, 151);

considered in estimating the damages.¹ In a few states, how-

or if the case be that of a husband, whose wife left no surviving children, the husband in such case being the sole legal distributee of her personal estate (*Steele v. Kurtz*, 28 Ohio St. 191); or a father, for whose benefit the action is brought for the death of his son, who had been emancipated from his control, and did not live with him (*Franklin v. The Railway*, 3 Hurl. & N. 211; *Dalton v. The Railway*, 4 Com. B. (N. S.) 296); or a widowed mother, on whose behalf a suit was brought for the negligent killing of her son, whether she was entitled to his services, and had a legal claim upon him for her support, or not (*Penn. R. R. v. Bantom*, 54 Penn. St. 495; *Quin v. Moore*, 15 N. Y. 432; *Penn. R. R. v. Keller*, 67 Penn. St. 300; *State of Md. v. Railroad*, 24 Md. 84; *Weems v. Mathison*, 4 Macq. H. L. Cas. 215; *R. R. v. Tindall*, 13 Ind. 366; *Brennan v. Mill Co.*, 44 Fed. Rep. 795; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205). Where a parent sues for the death of a son of full age, some evidence of pecuniary injury must be shown, as the parent would have no legal right to his services. *Winnt v. Railroad Co.*, 74 Tex. 32. It has in fact been expressed in a number of the cases, as the opinion of the judges, that the action under these statutes may be brought on behalf of any of the kindred of the deceased person who would be entitled to any portion of his estate by the law of distributions; and that it will be for the jury to say whether, by his death, any reasonable expecta-

tion of benefit from the continuance of the life of the deceased, on the part of the kinsman, has been disappointed; and if so, what the value of such reasonable expectation was. *Paulmier v. The Railroad, supra*; *City of Chicago v. Major*, 18 Ill. 349; *Jeffersonville, etc., R. R. v. Hendricks*, 41 Ind. 48; *Franklin v. Railway*, 3 H. & N. 211; *Duckworth v. Johnson*, 4 *id.* 653; *R. R. v. Baches*, 55 Ill. 379; *R. R. v. Weldon*, 52 *id.* 290; *Pym v. Railway*, 4 Best & S. 396.

1. *England*: *Blake v. Midland R. Co.*, 18 Q. B. 93, 21 L. J. Q. B. 233.

Alabama: *Alabama, etc., Ry. Co. v. Burgess*, 116 Ala. 509, 22 So. Rep. 913.

California: *Munro v. Dredging Co.*, 84 Cal. 515, 24 Pac. Rep. 303, 18 Am. St. Rep. 248.

Colorado: *Pierce v. Conners*, 20 Colo. 178, 37 Pac. Rep. 721, 46 Am. St. Rep. 279; *Railroad Co. v. Spencer*, 27 Colo. 313, 61 Pac. Rep. 606, 51 L. R. A. 151.

District of Columbia: *Bunyca v. Metropolitan R. Co.*, 19 App. D. C. 76; *Smith v. Cissel*, 22 App. D. C. 318.

Florida: *Florida Cent., etc., Ry. Co. v. Foxworth*, 41 Fla. 1, 25 So. Rep. 338, 79 Am. St. Rep. 149.

Illinois: *Wabash R. R. Co. v. Smith*, 162 Ill. 583, 44 N. E. Rep. 856.

Indiana: *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259.

Iowa: *Donaldson v. Railroad Co.*, 15 Iowa, 280, 87 Am. Dec. 391; *Dwyer v. Railway Co.*, 84 Iowa,

ever, as in Louisiana,² South Carolina,³ Virginia,⁴ and West Virginia,⁵ a contrary rule seems to prevail.

Sec. 1399. Nominal damages.—Except in England and a few of the United States,⁶ nominal damages may be recovered without any proof of actual pecuniary loss.⁷ In Illi-

479, 51 N. W. Rep. 244, 35 Am. St. Rep. 322.

Kansas: *Kansas Pac. Ry. Co. v. Cutter*, 19 Kan. 83.

Kentucky: *Louisville, etc., R. R. Co. v. Graham*, 98 Ky. 688, 17 Ky. L. R. 1229, 34 S. W. Rep. 229.

Maine: *Oakes v. Railroad Co.*, 95 Me. 103, 49 Atl. Rep. 418.

Maryland: *State v. Railroad Co.*, 24 Md. 84, 87 Am. Dec. 600.

Michigan: *Hyatt v. Adams*, 16 Mich. 180.

Missouri: *Barth v. Railroad Co.*, 142 Mo. 535, 44 S. W. Rep. 778; *Haines v. Pearson*, 107 Mo. App. 481, 81 S. W. Rep. 645.

New Jersey: *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

New Mexico: *Cerrillos Coal R. Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. Rep. 807.

New York: *Sternfels v. St. R. Co.*, 77 N. Y. Supp. 309, 73 App. Div. 494.

North Carolina: *Byrd v. Express Co.*, — N. C. —, 51 S. E. Rep. 851.

Ohio: *Steele v. Kurtz*, 28 Ohio St. 191.

Oregon: *Carlson v. Railroad Co.*, 21 Ore. 450, 28 Pac. Rep. 497.

Pennsylvania: *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335.

Tennessee: *Railroad Co. v. Wyrick*, 99 Tenn. 500, 42 S. W. Rep. 424.

Texas: *McGann v. Railway Co.*, 85 Tex. 289, 20 S. W. Rep. 80;

Railway Co. v. Bowen, 36 Tex. Civ. App. 165, 81 S. W. Rep. 80.

Utah: *Corbett v. R. Co.*, 25 Utah, 449, 71 Pac. Rep. 1065.

Vermont: *Lazelle v. Newfane*, 70 Vt. 440, 41 Atl. Rep. 511.

Washington: *Walker v. McNeill*, 17 Wash. 582, 50 Pac. Rep. 518.

Wisconsin: *Potter v. Railroad Co.*, 21 Wis. 372, 94 Am. Dec. 548.

2. *Parker v. Crowell & Spencer Lumber Co.*, 115 La. —, 39 So. Rep. 445.

3. *Brown v. Railway Co.*, 65 S. C. 260, 43 S. E. Rep. 794.

4. *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Matthews v. Warner*, 29 Gratt. 570; *Portsmouth St. R. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. Rep. 850.

5. *Kelley v. Ohio R. Co.* — W. Va. —, 52 S. E. Rep. 520.

6. *Duckworth v. Johnson*, 4 H. & N. 653; *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. Rep. 44; *Rouse v. Electric Ry. Co.*, 128 Mich. 149, 87 N. W. Rep. 68; *Cooper v. Electric Co.*, 63 N. J. L. 558, 44 Atl. Rep. 633; *McGown v. Railway Co.*, 85 Tex. 289, 20 S. W. Rep. 80; *Lazelle v. Newfane*, 70 Vt. 440, 41 Atl. Rep. 511.

7. *Alabama, etc., Ry. Co. v. Jones*, 121 Ala. 113, 25 So. Rep. 814; *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. Rep. 694, 14 Am. St. Rep. 69, 4 L. R. A. 296; *Burk v. Railroad Co.*, 125 Cal. 364, 57 Pac. Rep. 1065, 73 Am. St. Rep. 52;

nois, however, the rule seems to be otherwise as to actions in which collateral kindred are the beneficiaries. Proof of actual loss must be made as to them.⁸

Sec. 1400. Punitive damages ordinarily not recoverable.—Punitive or exemplary damages are ordinarily not recoverable,⁹ unless expressly allowed by statute.¹⁰ But in many states they may be recovered where death was caused by gross negligence or wilful act or omission.¹¹

Sec. 1401. Province of jury in allowing damages.—Owing to the uncertainty of life and of human affairs, the amount of damages recoverable cannot be fixed with mathematical accuracy, but it becomes pre-eminently a question for the jury who are often expressly authorized to award such damages as they may consider fair and just with reference to

Broughel v. Telephone Co., 73 Conn. 614, 48 Atl. Rep. 751; *Chicago, etc., R. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. Rep. 708; *Mulchahey v. Car-Wheel Co.*, 145 Mass. 281, 14 N. E. Rep. 106; *Johnson v. Railway Co.*, 18 Neb. 690, 26 N. W. Rep. 347; *Anderson v. Railway Co.*, 35 Neb. 95, 52 N. W. Rep. 840; *Grottenkemper v. Harris*, 25 Ohio St. 510; *North Penn. R. R. Co. v. Kirk*, 90 Pa. St. 15; *Jenkins v. Hankins*, 98 Tenn. 545, 41 S. W. Rep. 1028; *Kelley v. R. Co.*, 50 Wis. 381, 7 N. W. Rep. 291.

8. *Chicago, etc., R. R. Co. v. Gunderson*, *supra*.

9. *Lange v. Schoettler*, 115 Cal. 388, 47 Pac. Rep. 139; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. Rep. 348; *Conant v. Griffin*, 48 Ill. 410; *Atchison, etc., Ry. Co. v. Townsend*, — Kan. —, 81 Pac. Rep. 205; *Oakes v. Railroad Co.*, 95 Me. 103, 49 Atl. Rep. 418; *Hyatt v. Adams*, 16 Mich. 180; *Collier v. Arrington's Exec'rs*, 61 N. C. 356; *Pennsylvania Railroad Co. v. Van-*

dever, 36 Pa. St. 298; *Garrick v. Railway Co.*, 53 S. C. 448, 31 S. E. Rep. 334, 69 Am. St. Rep. 874; *Nohrden v. Railway Co.*, 54 S. C. 492, 32 S. E. Rep. 524; *Smith v. Railroad Co.*, 6 S. Dak. 583, 62 N. W. Rep. 967, 28 L. R. A. 573; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. Rep. 620; *Potter v. Railway Co.*, 21 Wis. 377, 94 Am. Dec. 548.

10. *Richmond & D. R. R. Co. v. Freeman*, 97 Ala. 289, 11 So. Rep. 800; *Kansas City, etc., Ry. Co. v. Sanders*, 98 Ala. 293, 13 So. Rep. 57; *Chiles v. Drake*, 59 Ky. 146, 74 Am. Dec. 406; *Bowler v. Lane*, 60 Ky. 311; *Railway in Kentucky v. Otis' Adm'r*, 25 Ky. L. R. 1686, 78 S. W. Rep. 480; *Adams v. Ry. Co. (Tex. Civ. App.)*, 79 S. W. Rep. 79. (But exemplary damages not allowed when no actual damages found.)

11. *Kansas, etc., Ry. Co. v. Miller*, 2 Colo. 442; *Morgan v. Duffree*, 69 Mo. 469, 33 Am. Rep. 508; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. Rep. 398; *Kansas, etc., Ry.*

the injury sustained. In order that excessive damages shall not be allowed, a maximum limit is frequently prescribed by the statute. The verdict of a jury, therefore, awarding damages will not ordinarily be set aside by the court unless it violates some express rule of law or is so grossly excessive or inadequate as to show passion and prejudice on the part of the jury.¹² If, however, it is plainly apparent that the jury must

Co. v. Doughtry, 88 Tenn. 721; *International, etc., Ry. Co. v. McDonald*, 75 Tex. 41.

12. *McGhee v. Willis*, 134 Ala. 281, 32 So. Rep. 301; *Choctaw, etc., Ry. Co. v. Doughty*, — Ark. —, 91 S. W. Rep. 768; *St. Louis, etc., Ry. Co. v. Robbins*, 57 Ark. 377, 21 S. W. Rep. 886; *St. Louis, etc., Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. Rep. 571; *St. Louis, etc., Ry. Co. v. Davis*, 55 Ark. 462, 18 S. W. Rep. 628; *Bowen v. Lumber Co.*, — Cal. App. —, 84 Pac. Rep. 1010; *Redfield v. St. Ry. Co.*, 110 Cal. 277, 42 Pac. Rep. 822; *Hall v. North. Pac. C. R. Co.*, 134 Fed. (Cal.) 309; *Hesse v. Tramway Co.*, 75 Conn. 571, 54 Atl. Rep. 299; *Nelson v. Lighting Co.*, 75 Conn. 548, 54 Atl. Rep. 303; *Georgia, etc., Ry. Co. v. Mathews*, 116 Ga. 424, 42 S. E. Rep. 771; *Georgia Railroad Co. v. Pittman*, 73 Ga. 325; *Chicago City Ry. Co. v. Bohnow*, 108 Ill. App. 346; *Chicago Edison Co. v. Moren*, 185 Ill. 571, 57 N. E. Rep. 773, *affirming* 86 Ill. App. 152; *Malott v. Shimer*, 153 Ind. 35, 54 N. E. Rep. 101, 74 Am. St. Rep. 278, 313; *Pittsburgh, etc., R. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. Rep. 150, 38 N. E. Rep. 594; *Farrell v. Railway Co.*, 123 Iowa, 690, 99 N. W. Rep. 578; *Bell v. Clarion*, 120 Iowa, 332, 94 N. W. Rep. 907; *Haas v. R. R. Co.*,

90 Iowa, 259, 57 N. W. Rep. 894; *St. Louis, etc., Ry. Co. v. French*, 56 Kan. 584, 44 Pac. Rep. 12; *Atchison, etc., Ry. Co. v. Hughes*, 55 Kan. 491, 40 Pac. Rep. 919; *Chesapeake, etc., Ry. Co. v. Dupee*, 23 Ky. L. R. 349, 67 S. W. Rep. 15; *Louisville, etc., R. R. Co. v. Mulfinger's Adm'x*, 26 Ky. L. R. 3, 80 S. W. Rep. 499; *Louisville, etc., R. R. Co. v. Scott*, 108 Ky. 392, 22 Ky. L. R. 30, 56 S. W. Rep. 674, 50 L. R. A. 381; *McCarthy v. Claffin*, 99 Me. 290, 59 Atl. Rep. 293; *Hobbs v. R. R. Co.*, 66 Me. 572; *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. Rep. 949; *Gray v. City Ry. Co.*, 87 Minn. 280, 91 N. W. Rep. 1106; *Vicksburg v. McLain*, 67 Miss. 4, 6 So. Rep. 774; *Geismann v. Electric Co.*, 173 Mo. 654, 73 S. W. Rep. 654; *Lee v. Knapp*, 155 Mo. 610, 56 S. W. Rep. 458; *Chicago, etc., Ry. Co. v. Young*, 67 Neb. 569, 93 N. W. Rep. 922; *Omaha v. Bowman*, 63 Neb. 333, 88 N. W. Rep. 521; *Cameron v. Railway Co.*, 70 N. J. L. 633, 57 Atl. Rep. 417; *Morhard v. Light & R. Co.*, — App. Div. —, 98 N. Y. Supp. 124; *Sternfels v. St. Ry. Co.*, 174 N. Y. 512, 66 N. E. Rep. 1117; *Lane v. Railway Co.*, 82 N. Y. Supp. 1057, 85 App. Div. 85; *Predmore v. Consumers', etc., Co.*, 91 N. Y. Supp. 118, 99 App. Div. 551; *Hoon v.*

have been influenced by passion or prejudice in finding a grossly excessive¹³ or inadequate¹⁴ verdict, the court will then interfere and set the verdict aside.

Traction Co., 204 Pa. St. 369, 54 Atl. Rep. 270; Ill. Cent. R. R. Co. v. Spence, 93 Tenn. 173, 23 S. W. Rep. 211, 42 Am. St. Rep. 907; Southern Queen Mfg Co v. Morris, 105 Tenn. 654, 58 S. W. Rep. 651; Texas, etc., Ry. Co. v. Robertson, 82 Tex. 657, 17 S. W. Rep. 1041; Railway Co. v. Jones, 35 Tex. Civ. App. 584, 80 S. W. Rep. 852; Norfolk, etc., Ry. Co. v. De Board, 91 Va. 700, 22 S. E. Rep. 514, 29 L. R. A. 825; Vowell v Coal Co., 31 Wash. 103, 71 Pac. Rep. 725; Turner v. Ry. Co., 40 W. Va. 675, 22 S. E. Rep. 83; Annas v. Ry. Co., 67 Wis. 46, 30 N. W. Rep. 282; Wiltse v. Tilden, 77 Wis. 152, 46 N. W. Rep. 234; \$5,000 each for widow and seven-year-old daughter not excessive for death of man who earned \$125 per month (St. Louis, etc., Ry. Co. v. Johnson, 78 Tex. 536, 15 S. W. Rep. 104); nor is \$10,000 for man whose expectancy of life is forty-two years and who earns \$650 a year (McDermott v. Railway Co. (Iowa), 47 N. W. Rep. 1037); nor is \$2,500 for killing of bright, healthy five-year-old child (Ross v. Railway Co., 44 Fed. Rep. 44); nor is \$6,250 for death of husband fifty-five years old, earning \$500 to \$1,200 a year (Paschall v. Owen, 77 Tex. 585, 14 S. W. Rep. 203); nor \$4,200 for death of plaintiff's son, who was supporting her, earning \$1,000 a year, and was twenty-six years old (Texas, etc., Ry. Co. v. Lester, 75 Tex. 56); nor \$3,000 under similar circumstances (O'Callaghan v. Bode, 84 Cal. 489); nor \$3,550 (Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220); nor \$15,000 (Chesapeake, etc., R. Co. v. Hendricks, 88 Tenn. 710); nor \$10,000 (Louisville, etc., R. Co. v. Brooks, 83 Ky. 129); nor \$10,000 (Missouri, etc., Ry. Co. v. Lehmborg, 75 Tex. 61), for the killing of a healthy, able-bodied man; nor \$4,000 for the death of a woman thirty-six years old (Bowles v. Railroad Co., 46 Hun, 324); nor \$1,000 for a woman sixteen years old (Kelly v. Railway Co., 14 Daly, 418), contributing to support of her parents; nor \$1,000 for death of infant son (Joliet v. Weston, 123 Ill. 641); nor \$15,000 for death of young, robust workman (East, etc., Ry. Co. v. Smith, 65 Tex. 167); nor \$5,000 for death of father and husband (Staal v. Railroad Co., 57 Mich. 239); nor \$2,000 (Mulcairns v. Janesville, 67 Wis. 24); nor \$2,500 (Annas v. Railroad Co., 67 Wis. 46) under like circumstances; nor \$2,000 for child eighteen months old (Schrier v. Railway Co., 65 Wis. 457); nor \$8,000 for death of a man leaving invalid wife and a daughter (Cook v. Railroad Co., 60 Cal. 604); nor \$3,500 for death of child where plaintiff remitted \$1,235 (Little Rock, etc., Ry. Co. v. Barker, 39 Ark. 491).

13. *McAdory v. Railroad Co.*, 94 Ala. 272, 10 So. Rep. 507; *Reiter-Conley Mfg Co. v. Hamlin*, — Ala. —, 40 So. Rep. 280; *St. Louis, etc., Ry. Co. v. Dawson*, 68 Ark. 1, 56 S. W. Rep. 46; *St. Louis, etc., Ry. Co. v. Mathis*, — Ark. —, 91 S. W. Rep. 763; *St. Louis,*

Sec. 1402. Distribution of damages recovered.—The distribution and apportionment of the damages recovered in actions for death by wrongful act is usually specifically provided for by statute. In some states the distribution is left to the jury,¹⁵ and in others the intestate laws govern,¹⁶ but the

- etc., *Ry. Co. v. Caraway*, — Ark. — 91, S. W. Rep 749; *Railway Co. v. Barker*, 33 Ark. 350; *Fox v. St. R. Co.*, 118 Cal. 55, 50 Pac. Rep. 25, 62 Am. St. Rep. 216; *Denver, etc., R. R. Co. v. Spencer*, 27 Colo. 313, 61 Pac. Rep. 606, 51 L. R. A. 121; *Florida Cent., etc., R. Co. v. Foxworth*, — Fla. — 34 So. Rep. 270; *Chicago, etc., R. R. Co. v. Helborg*, 99 Ill. App. 563; *Chicago, etc., Ry. v. Gillam*, 27 Ill. App. 386; *Hively v. Webster County*, 117 Iowa, 672, 91 N. W. Rep. 1041; *Atchison, etc., R. Co. v. Brown*, 26 Kan. 443; *Atchison, etc., Ry. Co. v. Ryan*, 62 Kan. 682, 64 Pac. Rep. 603; *Missouri, etc., Ry. Co. v. McLaughlin*, — Kan. —, 84 Pac. Rep. 989; *Louisville, etc., R. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. Rep. 227; *Clive v. Ry. Co.*, 42 La. Ann. 35, 7 So. Rep. 66; *Rawsdell v. Grady*, 97 Me. 319, 54 Atl. Rep. 763; *Conley v. Ry. Co.*, 95 Me. 149, 49 Atl. Rep. 668; *Donald v. Steel Co.*, — Mich. —, 103 N. W. Rep. 829; *Nelson v. Railway Co.*, 104 Mich. 582, 62 N. W. Rep. 993; *Bremer v. Railway Co.*, — Minn. —, 105 N. W. Rep. 494; *Parsons v. Railway Co.*, 94 Mo. 286, 6 S. W. Rep. 464; *Vicksburg v. McLain (Miss.)*, 6 So. Rep. 774; *Cook v. Gunpowder Co.*, 70 N. J. L. 65, 56 Atl. Rep. 114; *Grieve v. St. Ry. Co.*, 65 N. J. L. 409, 47 Atl. Rep. 427; *Rowe v. Tel. Co.*, 66 N. J. L. 19, 48 Atl. Rep. 523; *Walsh v. Rosenberg*, 97 N. Y. Supp. 328; *Durfield v. City of New York*, 92 N. Y. Supp. 204, 101 App. Div. 581; *Coolidge v. City of New York*, 90 N. Y. Supp. 1078, 99 App. Div. 175; *Railroad Co. v. Satterwhite*, 112 Tenn. 185, 79 S. W. Rep. 106; *Creamer v. Moran Bros. Co.*, — Wash. —, 84 Pac. Rep. 592; *The Saginaw*, 139 Fed. 906; *Hirschkovitz v. Penn. R. Co.*, 138 Fed. 438.
14. *James v. Railway Co.*, 92 Ala. 231, 9 So. Rep. 335; *Wolford v. Min. Co.*, 63 Cal. 483; *Broughel v. Tel. Co.*, 72 Conn. 617, 45 Atl. Rep. 435, 49 L. R. A. 404; *McCarthy v. Transit Co.*, — Mo. —, 91 S. W. Rep. 132; *Burns v. Oil Co.*, 26 Tex. Civ. App. 223, 63 S. W. Rep. 1061; *The San Rafael*, — C. C. A. —, 141 Fed 270, *modifying* 134 Fed 749.
15. *Houston City St. Ry. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31; *International, etc., Ry. Co. v. Lehman (Tex. Civ. App.)* 72 S. W. Rep. 619; *International, etc., Ry. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. Rep. 772; *Baltimore, etc., R. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384.
- See, also, *Childs v. Bolton*, 69 S. C. 555, 48 S. E. Rep. 618; *Kitchen v. Railway Co.*, 68 S. C. 554, 48 S. E. Rep. 4.
16. *Griswold v. Griswold*, 111 Ala. 572, 20 So. Rep. 437; *Paulmier v. Erie R. Co.*, 34 N. J. L. 151; *Allison v. Powers*, 179 Pa. St. 531, 36 Atl. Rep. 333.

statute in each state should be consulted by the practitioner. These statutes also usually provide that the amount recovered shall be free from the claims of creditors and legatees. Where, however, the amount recovered is regarded as an asset of the estate, creditors or legatees would be entitled to share in the proceeds in the absence of an express provision in the statute to the contrary.¹⁷

Distribution is governed by the statute of the state in which the wrongful act causing death occurs,¹⁸ and the statute existing at the time of the death of the intestate controls.¹⁹

III. OF ACTIONS IN GENERAL.

1. *The form of action.*

Sec. 1403. (§ 790.) Form of action optional.—As in the case of common carriers of goods and merchandise, the carrier of passengers may be sued for an injury to the passenger by his negligence, either in *assumpsit* for the breach of the contract, whether express or implied, to carry safely, or in an action on the case for the wrong;²⁰ and the same rules prevail as to the consequences of the misjoinder or nonjoinder of parties;²¹ and the same advantages and disadvantages are experienced in the one form of action or the other, when the injury to the passenger is the subject of the action, as when it is an injury to goods.²²

17. *Mo. Pac. Ry. Co. v. Bennett, Co.*, 87 Mich. 374, 49 N. W. Rep. 621.
5 Kan. App. 231.

18. *Weaver v. Railroad Co.*, 21 App. D. C. 499; *Hartley v. Hartley*, — Kan. —, 81 Pac. Rep. 505; *McDonald v. McDonald*, 96 Ky. 209, 28 S. W. Rep. 482, 16 Ky. L. R. 412, 49 Am. St. Rep. 289; *Hartness v. Pharr*, 133 N. C. 566, 45 S. E. Rep. 901, 98 Am. St. Rep. 725; *In re Coe's Estate*, — Iowa, —, 106 N. W. Rep. 742.

19. *Richmond v. Chicago, etc., R.*

20. *Knights v. Quarles*, 2 Brod. & Bing. 102; *Penn. R. R. v. The People*, S. Ct. of Ohio (1877), 6 Cen. L. Jour. 436; *Magee v. Navigation Co.*, 46 Fed. 734; *Railway Co. v. Russ*, 57 Fed. 822, 6 C. C. A. 597, 18 U. S. App. 279; s. c. 67 Fed. 662, 14 C. C. A. 612, 34 U. S. App. 14; *Railroad Co. v. Storms*, 15 Ky. Law Rep. 333.

21. *Ante*, §§ 1324, 1327.

22. *Ante*, §§ 1328, 1333.

Sec. 1404. (§ 791.) Form of action when exemplary damages are claimed.—Generally, as in actions against the common carrier for injury to goods while in his custody or for delay in their delivery, compensation being the rule for the assessment of damages for a personal injury to the passenger, it can make no difference in the amount of recovery whether the action be in *assumpsit* for a breach of the contract, or in tort for the neglect of duty. But in actions for wrongs to the person, the circumstances are sometimes such, even when the injury has occurred from the negligence of the carrier, that the law will not limit the recovery to the actual damage sustained, but will allow what are known as exemplary or vindictive damages;²³ and whenever this is the case, and the plaintiff would seek to recover such damages, he must declare in case and not in *assumpsit*. For when, by his own election, he makes the breach of the contract the gravamen of his action, he will be restricted in his recovery to the damages actually sustained as the proximate result of such breach.²⁴

Sec. 1405. (§ 792.) Form when brought by personal representative.—When, however, the right of action survives to the personal representative upon the death of the injured party, as it does by the common law so far as it rests upon the breach of contract, and by statutory provisions, even when it may have been commenced by him in his life-time as an action in tort, no recovery can be had by such personal representative in his official character, unless it be shown that the deceased party has suffered some pecuniary loss which has impaired to that extent the value of his estate, such as loss which occurred by reason of his being himself rendered incapable of attention

²³ *Post*, § 1435, *et seq.*

657; New Orleans, etc., Railroad

²⁴ *Walsh v. The Railway*, 42 Wis. 23; *Norfolk, etc., R. Co. v. R. R. v. Kennedy*, 41 *id.* 671. *Wysor*, 82 Va. 250; *Goins v. Railroad Co.*, 68 Ga. 190; *Hughes v. Railroad Co.*, 61 Ga. 131; *Hamlin v. Railway Co.*, 1 H. & N. 408; *Craker v. The Railway*, 36 Wis.

v. Moore, 40 Miss. 39; Miss. Cen. Counts in tort and counts in contract cannot be joined in the same action. *Norfolk, etc., R. Co. v. Wysor*, *supra*.

to his business affairs, or the loss of the service of another to which he was entitled, and of which he was deprived by the injury inflicted upon such servant through the carrier's negligence. The damages in such cases, unless otherwise provided by the statute law, would be limited to the actual pecuniary loss; and consequently nothing could be recovered on the ground of the personal pain and suffering of the deceased party.²⁵ The Tennessee statute contains the peculiar provision that "if the deceased had commenced an action before his death, it shall proceed without a revivor."²⁶ That the recovery in that state may include damages for the pain and suffering of the decedent is seen in *Railroad v. Prince*.²⁷

Sec. 1406. (§ 793.) Recovery must be for cause of action stated.—The plaintiff can recover only on the grounds stated in his declaration; and hence in an action by a passenger for an injury done to him by the overturning of a stage-coach, if the declaration states that the servants of the defendant negligently "drove, conducted and managed" the coach, the plaintiff cannot recover, if the negligence consisted in sending out an insufficient coach.²⁸ So if the declaration should charge the injury to the passenger to the want of care and skill on the part of the driver of a stage-coach, and not to any deficiency in the coach, harness or horses, proof that the injury was occasioned by a defect in the lines could give no right of recovery to the plaintiff. And where the declaration alleges that the

25. *Chamberlain v. Williamson*, 2 Maule & S. 408; *Knights v. Quarles*, 2 Brod. & B. 102; *Lockier v. Paterson*, 1 Car. & Kir. 271; *Zabriskie v. Smith*, 13 N. Y. 322.

26. Sec. 2293, Code of Tenn.

27. 2 Heisk. 580.

28. *Mayor v. Humphries*, 1 C. & P. 251. See, also, *Breese v. The Railroad*, 52 N. J. L. 250; *Allin v. The Railway*, 26 Tex. Civ. App. 43, 62 S. W. Rep. 1079; *Railway Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. Rep. 1047; *Fitzgibbon v.*

The Railway, 108 Iowa, 614, 79 N. W. Rep. 477; s. c. 119 Iowa, 261, 93 N. W. Rep. 276; *So. Ry. Co. v. Roach*, — Ind. App. —, 77 N. E. Rep. 606; s. c. 78 S. E. Rep. 201.

Where the gist of the complaint is the violation of the contract to carry, the plaintiff cannot recover on the theory of the use of unnecessary violence in effecting a rightful ejection. *Chicago, etc., R. Co. v. Field*, 7 Ind. App. 172, 34 N. E. Rep. 406, 52 Am. St. Rep. 444.

passenger was injured by being thrown from the door of the car in which he was riding, proof that the injury resulted by reason of his jumping from the car because of a belief that danger was imminent will not entitle him to recover for the injury.²⁹ And if, in an action by the passenger for an injury inflicted upon him, he elects to plead specially the facts upon which he relies for a recovery when he would have the right to rely upon general allegations for the admission of his proof, he must confine his proof to the facts alleged and can recover upon no other ground.³⁰

Sec. 1407. (§ 794.) How form of action is determined.—

Whether the action in each particular case is to be regarded as one in *assumpsit* or in case is to be determined by the same rules upon which rests the distinctive character of the declaration in actions for the loss of goods. It does not follow that in an action by the passenger, any more than in one brought by the owner of goods, the allegation in his declaration of the contract or undertaking to carry him as a passenger determines that the action is upon the contract and not for the breach of duty. In many cases the contract is stated as the inducement or consideration from which the duty results, the breach or neglect of which is complained of; and the tort or wrong arising from such breach or neglect of duty is the gravamen of the action. In such cases the action will be treated as in case and not in *assumpsit*. But the distinction between the two forms is confessedly nice and difficult to draw.³¹

29. *Chitty v. The Railway*, 148 Mo., 64, 49 S. W. Rep. 868.

30. *Johnson v. The Railway*, 27 Tex. Civ. App. 616, 66 S. W. Rep. 906.

31. *Emigh v. The Railroad*, 4 Biss. 114. See, also, *Railway Co. v. Hanmer*, 23 Ky. Law Rep. 1846, 66 S. W. Rep. 375.

Though the declaration alleges a contract for carriage, an action by a passenger against the carrier,

for wrongfully expelling him from the train with force and violence, is not for a breach of the contract, but for a tort. *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. Rep. 1112, 33 Am. St. Rep. 157. Where a passenger is wrongfully ejected from a train, his remedy is not necessarily for a breach of the contract, but properly lies in tort. *Wilson v. Northern Pacific Co.*, 5 Wash. 621, 32 Pac. Rep. 468.

Sec. 1408. (§ 795.) Same subject.—But when an express or special contract with the carrier is not alleged, nor its breach made the gravamen of the plaintiff's action, it is said that the courts will be inclined to treat actions of this kind as founded upon the breach of duty.³² And especially is this true under a system of pleading in which the formal distinctions between actions are abolished, and the declaration merely states the facts which constitute the cause of action.³³ And at common law, in the absence of an express contract or promise, "if from a given state of facts the law raises a legal obligation to do a particular act, and there was a breach of that obligation, and a consequential damage, although *assumpsit* might be maintainable upon the implied promise," the more appropriate form of action was in case.³⁴

Where the complaint alleges the sale of a ticket entitling the plaintiff to ride to a certain station, by which ticket the defendant contracted to carry him, etc., and that after embarking upon the defendant's train, the conductor refused to carry him further than an intermediate station in violation of defendant's duty and undertaking to carry plaintiff to the end of his journey, and wrongfully and in violation of the defendant's undertaking, removed him in a rude and forceful manner from the said train in violation of the duty which the defendant undertook for him to perform, the gravamen of the action is tort. *Railway Co. v. Bunnell*, 138 Ala. 247, 36 So. Rep. 380. Inasmuch as the passenger, who has been wrongfully expelled from a railway train, may not maintain an action without pleading and proving his contract and its breach, the action is not one either strictly *ex contractu* or strictly *ex delicto*, but is more

properly an action the gravamen of which is a tortious act based upon the breach of a contract. *Serwe v. The Railroad*, 48 Minn. 78, 50 N. W. Rep. 1021. See, also, *Boling v. Railroad Co.*, — Mo. —, 88 S. W. Rep. 35.

32. *Heirn v. McCaughan*, 32 Miss. 17; *Collyer on Part*, § 735.

33. *New Orleans, etc., R. R. v. Hurst*, 36 Miss. 660.

34. *Chitty on Pl.* 135; *Burnett v. Lynch*, 5 Barn. & C. 589. See, also, *Railway Co. v. Laird*, 164 U. S. 393, 17 Sup. Ct. R. 120; *s. c.* 58 Fed. 760, 7 C. C. A. 489.

"If," said Smith L. J., in *Kelly v. The Railway* (1895), 1 Q. B. 944, "the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract and not upon tort. If, on the other hand,

2. *The pleadings.*

Sec. 1409. (§ 796.) Special damages must be pleaded.—It is also equally necessary for the passenger who sues for an injury occasioned by the negligence of the carrier to set out in his declaration any special damage which he may wish to recover; and a general allegation of damages at the end of his declaration will allow proof of only such damages as are the usual and natural consequence of the wrong complained of.³⁵ And where the plaintiff undertook to show, under such a general allegation, her education and learning, and that her business or occupation was that of a school teacher, which had been interrupted by the injury sustained by her through the carrier's negligence, it was held that such evidence was inadmissible.³⁶ So where, without any allegation of special damage, the plaintiff claimed that the damages to be allowed her should be enhanced by reason of the fact that she was an unmarried woman, and that the injury inflicted upon her by the carrier's negligence impaired her matrimonial prospects, and the judge upon the trial so instructed the jury, it was held that this was error, and on appeal the verdict was set aside. "The defendant," said the court, "had no notice that damages would be

the relation of the plaintiff and the defendants be such that a duty arises from the relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

35. *Laing v. Colder*, 8 Penn. St. 479; *Hunter v. Stewart*, 47 Me. 419; *Caldwell v. Murphy*, 11 N. Y. 416; *Walker v. Railway Co.*, 63 Barb. 260; *Kinney v. Crocker*, 18 Wis. 74; *The Oriflamme*, 3 Sawyer, 397; *Railroad Co. v. Siddons*, 53 Ill. App. 607. But only those damages which are not the probable or necessary result of the injury need be specially alleged. *Railroad Co.*

v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77. Loss of earnings or of business is not a necessary or probable result of a personal injury, and must therefore be specially alleged. *Paquin v. The Railway*, 90 Mo. App. 118. The cost of an artificial limb which is purchased as a result of the injury sued for must be alleged as special damages in order that proof thereof may be admitted. *Railway Co. v. Hall*, 100 Fed. 760, 41 C. C. A. 50. See, also, *Railway Co. v. Cotton*, 41 Ill. App. 311, 316.

36. *Baldwin v. The Railroad*, 4 Gray, 333.

claimed for any such cause, and therefore could not be prepared to prove or disprove its existence. As damages have been given for a special injury, having no necessary connection with the wrongful acts of the defendant, and neither set forth in the declaration nor established by the evidence, the exceptions must be sustained.’³⁷

Sec. 1410. (§ 797.) Same subject.—So where, under the general *ad damnum* clause* of his declaration, the plaintiff undertook to show that he had a large family dependent upon him for support, and that in consequence of the injury sustained by him whilst a passenger on defendants’ road, through the negligence of their servants, he had become embarrassed in his circumstances, it was held the proof was not competent with a view of increasing the plaintiff’s damages. “Such damages,” it was said, “may or may not follow a temporary bodily disability. They may, but do not necessarily attend upon it. Whether they do or not is to be determined, not by a consideration of the principal fact complained of, but by looking to the pecuniary condition of the sufferer, his capacity for labor, his social relations, and, it may be, to other independent facts. Damages of this nature are, therefore, not direct or necessary, but special, as being possible only, and must be specially averred to let in evidence of them.’³⁸

3. *The evidence.*

Sec. 1411. (§ 798.) Proof of the carrier’s negligence.—What constitutes such negligence on the part of the carrier as will make him liable for injuries to the passenger occasioned thereby has already been the subject of inquiry, and the principles upon which his liability depends have been stated so far as it can be done from the adjudicated cases.³⁹ Generally, as we have seen, it is a question of fact rather than of law, whether in any particular instance the carrier is chargeable

³⁷. *Hunter v. Stewart*, 47 Me. 419.

³⁸. *Laing v. Colder*, 8 Barr, 479.
³⁹. *Ante*, ch. XI.

with culpable negligence, as well as whether the passenger has, by his own imprudence and want of caution, so far contributed towards bringing the misfortune upon himself as to exonerate the carrier from legal liability. Direct proof of negligence is in most cases, from the nature of the occurrences involving the question, impossible, and must depend upon the proof of circumstances from which it may be inferred.⁴⁰ Still, as the law will not presume negligence, it will be necessary to a recovery against the carrier, in every case in which his liability depends upon its existence, for the plaintiff to prove it, either positively or by the evidence of facts from which it may be reasonably presumed.⁴¹

Sec. 1412. (§ 799.) Presumptions as to negligence.—The obligation of the carrier of passengers being to exercise the utmost care and diligence for their safety, it is frequently stated as a rule of evidence, in cases resting upon the question of his negligence, that proof of the accident and of the injury to the passenger thereby, without more, at once creates the presumption of negligence, which it becomes incumbent upon him to rebut.⁴² This, however, is hardly a correct statement of the law. The mere happening of the accident, aside from the circumstances by which it has been occasioned or attended, may in every case be consistent with the exercise of the highest degree of care and circumspection. Carriers of passengers cannot be held liable for the consequences of accidents against which no human care or foresight could have provided; and if nothing be shown further than that an accident has happened to his vehicle, from which a passenger has sustained an injury, for aught that would appear, it may have happened

40. Ill. Cent. R. R. *v.* Cragin, 71 Ill. 177; Garrett *v.* The Railway, 36 Iowa, 121; Lyons *v.* Rosenthal, 11 Hun, 46. 61 S. Car. 345, 39 S. E. Rep. 543; Doolittle *v.* The Railway, 62 S. Car. 130, 40 S. E. Rep. 133; Gleason *v.* Railway Co., 140 U. S. 435, 11 Sup.

41. Nelson *v.* The Railroad, 50 N. Y. Supp. 63, 25 App. Div. 535, citing Hutchinson on Carr. Ct. 859, 35 L. Ed. 458; Southern Pacific Co. *v.* Cavin, — C. C. A. —, 144 Fed. 348.

42. See Cooper *v.* The Railway,

from some cause for which the carrier could not be held responsible. It may have been occasioned by the act of God, which excuses alike the common carrier of goods and the public carrier of passengers; or by the act of a stranger, against which it was impossible for the carrier to guard.⁴³ And the fact being that, for a large proportion of the accidents which occur in the transportation of passengers, and from which they sustain injuries, the carrier is in no wise responsible, it cannot be legally inferred in any instance from the mere proof of the accident, without showing how it occurred, that it was attributable to the negligence of the carrier or of his servants.⁴⁴ Thus, the mere unexplained fact that a stream of water entered the window of the carrier's vehicle, causing injury to a passenger, will not be sufficient to raise a presumption that the injury was due to the carrier's negligence.⁴⁵ Nor will the mere show-

43. *Deyo v. The Railroad*, 34 N. Y. 9; *Aston v. Heaven*, 2 Esp. 533; *Frink v. Potter*, 17 Ill. 406; *Fredericks v. The Railroad*, 157 Penn. St. 103, 27 Atl. Rep. 689, 22 L. R. A. 306.

44. *Yarnell v. The Railroad*, 113 Mo. 570, 21 S. W. Rep. 1, 18 L. R. A. 599; *Allen v. The Railway*, 35 Wash. 221, 77 Pac. Rep. 204; *Faulkner v. The Railroad*, 187 Mass. 254, 72 N. E. Rep. 976.

The circumstances attending the injury, upon which negligence can be predicated, must be shown. *Railroad Co. v. State*, 95 Md. 637, 53 Atl. Rep. 969. A mere showing that the plaintiff, while standing near the open door of the coach in which he was riding, was thrown down and injured by "a fearful shock," without proof of the cause or nature of the shock, or whether it involved the train or the car in which he was riding or was simply personal to himself, is not sufficient evidence upon

which to base a presumption that the carrier was guilty of negligence. *Saunders v. The Railway*, 6 S. Dak. 40, 60 N. W. Rep. 148.

Where a passenger endeavors to get inside of a crowded car, but finds that he is unable to do so, and he is later pushed from the platform which is also crowded and thereby injured, he has the burden of proving that the injury was due to the carrier's negligence. *Dennis v. The Railroad*, 165 Penn. St. 624, 31 Atl. Rep. 52, 36 Wkly. Notes Cas. 81.

It is a matter of common knowledge that jolts and jars are incident to the operation of freight trains. Negligence, therefore, cannot be inferred from the mere fact that an injury was suffered from a jar occasioned by the stopping of such a train. *Portuchek v. The Railroad*, 101 Mo. App. 52, 74 S. W. Rep. 368.

45. *Spencer v. The Railway*, 105 Wis. 311, 81 N. W. Rep. 407.

ing that a passenger by ferry-boat, while passing over the deck which had been made slippery by a brief fall of snow, slipped and sustained injury be sufficient to charge the owners of the boat with negligence.⁴⁶ And where it was shown that the plaintiff, while sitting in the carrier's vehicle near an open window, was struck and injured by an object from the outside of the vehicle, but no evidence of any sort was offered as to the character of the object or the cause of its being thrown into the vehicle, it was held that the burden of proof was upon the plaintiff to establish negligence, and that the evidence adduced was not sufficient to show that the carrier had been at fault.⁴⁷ Nor will a mere scintilla of evidence, or a mere surmise that the carrier may have been guilty of negligence, justify a verdict against him.⁴⁸ Nor can a recovery be had against him where the proof is equally consistent with the absence as with the existence of negligence, or where, in other words, it is left doubtful from all the evidence whether there has been negligence or not.⁴⁹ So where the injury, unexplained by the attending circumstances, is such that it might as plausibly have resulted from negligence on the part of the passenger as on the part of the carrier, the latter cannot be held responsible.⁵⁰

46. *Fearn v. The Ferry Co.*, 143 Penn. St. 122, 22 Atl. Rep. 708.

47. *Thomas v. The Railroad*, 148 Penn. St. 180, 23 Atl. Rep. 989, 15 L. R. A. 416.

Where a passenger, sitting by an open window of a moving car, is struck in the eye by a stone or piece of coal at the moment of the passing of another train, there is no presumption of negligence, and no recovery can be had without evidence that the injury was caused by the carrier's negligence. *Pennsylvania R. Co. v. MacKinney*, 124 Pa. St. 462. A declaration which shows that the injury was caused by pure accident is demurrable. *Hardwick v. Railroad Co.*,

85 Ga. 507, 11 S. E. Rep. 832.

48. *Toomey v. The Railway*, 3 Com. B. (N. S.) 146; *Curtis v. The Railroad*, 18 N. Y. 534; *Le Barron v. The Ferry Co.*, 11 Allen, 312; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *Kendall v. Boston*, 118 *id.* 234; *Edgerton v. The Railroad*, 39 N. Y. 227; *Cotton v. Wood*, 8 Com. B. (N. S.) 568; *Hammack v. White*, 11 *id.* 588; *Cooke v. Waring*, 2 Hurl. & C. 332; *Scott v. Dock Co.*, 3 *id.* 596; *Rothschild v. The Railroad*, 163 Penn. St. 49, 29 Atl. Rep. 702.

49. *Cotton v. Wood*, *supra*; *Stern v. The Railroad*, 76 Mich. 591.

50. *Price v. The Railway*, — Ark. —, 88 S. W. Rep. 575.

Sec. 1413. (§ 800.) When the fact of the injury is *prima facie* evidence of negligence.—But the carrier being required, at his peril, to provide vehicles and other apparatus for the conveyance of passengers, without defects or imperfections which can be discovered by the skilful application of known tests for their detection, and to see that the road and its appliances are as safe for the conveyance of passengers as the utmost care, skill and diligence can reasonably make them, whenever it appears that an accident from which the passenger has received an injury was connected with the means or the instrumentalities used in the transportation, a *prima facie* presumption will at once arise, founded upon the probability that if the utmost care, skill and diligence had been exercised the accident would not have happened, that it was occasioned by the carrier's negligence. The burden of proof will consequently be upon the carrier to show that he was not at fault.⁵¹ Nor, under such circumstances, can there be anything unjust in requiring him to assume the burden of disproving that the accident was caused by his negligence. The means and the instrumentalities employed in the transportation are peculiarly under his control, and he is therefore in a much better position to explain the cause of the accident than the passenger, who might find such cause extremely difficult to prove.⁵²

51. *Bernhardt v. The Railroad*, 159 Penn. St. 360, 28 Atl. Rep. 140; *Herstine v. The Railroad*, 151 Penn. St. 244, 25 Atl. Rep. 104; *Fleming v. The Railway*, 158 Penn. St. 130, 27 Atl. Rep. 858; *Railroad Co. v. Shivers*, — Md. —, 61 Atl. Rep. 618; *McCurrie v. The Railroad*, 122 Cal. 558, 55 Pac. Rep. 324; *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. Rep. 809; *s. c.* 57 Ill. App. 538; *Railroad Co. v. Burrows*, 62 Kan. 89, 61 Pac. Rep. 439; *Railroad Co. v. Steenberger*, 24 Ky. Law Rep. 761, 69 S. W. Rep. 1094; *Railroad Co. v. Rudolph*, 113 Ga. 143, 38 S. E. Rep. 328; *Kentucky, etc. Bridge Co. v. Quimper*, 2 Ind. App. 244, 28 N. E. Rep. 338; *Railroad Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. Rep. 978; *Kefauver v. The Railway Co.*, 122 Fed. 966; *Williams v. Railway Co.*, — Wash. —, 80 Pac. Rep. 1100; *Evers v. Ferry Co.*, — Mo. App. —, 92 S. W. Rep. 118. By statute, in Georgia, injury to passenger raises a presumption of negligence. See *Railway Co. v. Myers*, 87 Fed. 149, 32 C. C. A. 19.

52. *Smith v. The Railway*, 32 Minn. 1, 18 N. W. Rep. 827. In Nebraska it is provided by statute (Compiled Laws of Neb.,

Sec. 1414. Same subject.—Where, therefore, it is shown that an accident happened upon a railway, from which a passenger sustained an injury, by the breaking down or the overturning of the vehicle,¹ or by a derailment of the train or of some of the cars,² or by a collision between two trains or between

1889, c. 72, art., 1, sec., 3, p. 628) that every railroad company * * * shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or where the injury complained of results from his violation of some express rule or regulation of the company actually brought to his notice. Under this statute it is held that where a person is injured "while being transported as a passenger," he need only show, to entitle him to a recovery, that he was a passenger and that while such, he was injured, and the extent of the injury suffered. The burden of proof will then be upon the company to excuse itself from liability which it can do only by showing that the injury resulted from the criminal negligence of the passenger, or was the result of a violation by him of some express rule or regulation of the company actually brought to his notice. *Railway Co. v. Zernecke*, 183 U. S. 582, *affirming* 59 Neb. 689, 82 N. W. Rep. 26, 55 L. R. A. 610; *Railway Co. v. Eaton*, 183 U. S. 589, *affirming* 59 Neb. 698, 82 N. W. Rep. 1119; *Railroad Co. v. French*, 48 Neb. 638, 67 N. W. Rep. 472; *Railroad Co. v. Hague*, 48 Neb. 97, 66 N. W. Rep. 1000; *Railroad Co. v. Landauer*, 39 Neb. 803, 58 N. W. Rep. 434; *Railway Co. v. Porter*, 38 Neb. 226, 56 N. W. Rep. 808; *Railway Co.*

v. Baier, 37 Neb. 235, 55 N. W. Rep. 913. The term criminal negligence under this statute is held to mean such negligence as amounts to a flagrant disregard of one's own safety, and a willful indifference to the injury likely to follow. *Railroad Co. v. Hague*, *supra*; *Clark v. Zernecke*, 106 Fed. 607, 45 C. C. A. 494. That such a statute is not inimical to the 14th amendment of the United States constitution, or to the constitution of the state, see *Railway Co. v. Zernecke*, 183 U. S. 582; *Railway Co. v. Eaton*, 183 U. S. 589; *Railway Co. v. Young*, 58 Neb. 678, 79 N. W. Rep. 556; *Railway Co. v. Chollette*, 41 Neb. 578, 59 N. W. Rep. 921; *Railroad Co. v. Hambel*, 2 Neb. (unofficial) 607, 89 N. W. Rep. 643. That it is not restricted in its application to an action by the passenger for an injury sustained by him, but extends to actions by third persons for damages resulting from such injury, see *Railway Co. v. Chollette*, *supra*. That it is not applicable to a passenger who is traveling on a drover's pass, see *Railroad Co. v. Crow*, 54 Neb. 747, 74 N. W. Rep. 1066, 69 Am. St. Rep. 741.

1. *Railway Co. v. Mitchell*, 57 Ark 418, 21 S. W. Rep. 883; *Clark v. The Railroad*, 127 Mo. 197, 29 S. W. Rep. 1013; *Felton v. Holbrook*, 21 Ky. Law Rep. 1824, 56 S. W. Rep. 506; *Railway Co. v. Rubenstein*, 5 Colo. App. 121, 38 Pac. Rep. 76.

2. *Railroad Co. v. Hill*, 93 Ala.

two cars,³ or by an unusual jerk or jolt of the train,⁴ or by the

514, 9 So. Rep. 722, 30 Am. St. Rep. 65; Louisville, etc. R. Co. *v.* Jones, 83 Ala. 376; Montgomery, etc. R'y. Co. *v.* Mallette, 92 Ala. 209, 9 So. Rep. 363; Railway Co. *v.* Griffith, 63 Ark. 491, 39 S. W. Rep. 550; Roberts *v.* The Railroad, 78 Ill. App. 526; Railroad Co. *v.* Sheeks, 155 Ind. 74, 56 N. E. Rep. 434; Railway Co. *v.* Miller, 141 Ind. 533, 37 N. E. Rep. 343; Railroad Co. *v.* Grimm, 25 Ind. App. 494, 57 N. E. Rep. 640; Cronk *v.* The Railroad, 123 Iowa, 349, 98 N. W. Rep. 884; Whittlesley *v.* The Railway, 121 Iowa, 597, 90 N. W. Rep. 516; Railroad Co. *v.* Elder, 57 Kan. 312, 46 Pac. Rep. 310; Southern, etc. R. Co. *v.* Walsh, 45 Kan. 653, 26 Pac. Rep. 45; Furnish *v.* The Railway, 102 Mo. 438, 13 S. W. Rep. 1044; Dimmitt *v.* The Railroad, 40 Mo. App. 654; Norton *v.* The Railway, 40 Mo. App. 642; Railway Co. *v.* Young, 58 Neb. 678, 79 N. W. Rep. 556; Spellman *v.* The Transit Co., 36 Neb. 890, 55 N. W. Rep. 270, 38 Am. St. Rep. 753, 20 L. R. A. 316; Webster *v.* The Railroad, 32 N. Y. Supp. 590; Stembridge *v.* The Railway, 65 S. Car. 440, 43 S. E. Rep. 968; Railroad Co. *v.* Kuhn, 107 Tenn. 106, 64 S. W. Rep. 202; Gulf, etc. R'y. Co. *v.* Wilson, 79 Tex. 371; Railway Co. *v.* Harkey, — Tex. Civ. App. —, 88 S. W. Rep. 506; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766; Minihan *v.* The Railway, 138 Fed. 37; Bryce *v.* The Railway, 129 Fed. 966; s. c. 125 Fed. 958; Railroad Co. *v.* Crumpler, 122 Fed. 425, 59 C. C. A. 51; Albion Lumber Co. *v.* De Nobra, 72 Fed. 739, 19 C. C. A. 168, 44 U. S. App. 347; Brown *v.* Railroad Co., — Miss. —, 41 So. Rep. 383; Davis *v.*

Railway Co., — Tex. Civ. App. —, 93 S. W. Rep. 222; O'Clair *v.* Rhode Island Co., — R. I. —, 63 Atl. Rep. 238; Evansville, etc. R. Co. *v.* Mills, — Ind. App. —, 77 N. E. Rep. 608.

3. Skinner *v.* The Railway, 5 Exch. 787; Georgia, etc. R. Co. *v.* Love, 91 Ala. 432, 8 So. Rep. 714, 24 Am. St. Rep. 927; Sambuck *v.* The Railroad, (Cal.) 71 Pac. Rep. 174; Green *v.* Pacific Lumber Co., 130 Cal. 435, 62 Pac. Rep. 747; Railroad Co. *v.* DeLong, 109 Ill. App. 241; Louisville, etc. R. Co. *v.* Taylor, (Ind.) 25 N. E. Rep. 869; Larkin *v.* The Railway, 118 Iowa, 652, 92 N. W. Rep. 891; Railway Co. *v.* Hausman, 21 Ky. Law Rep. 1264, 54 S. W. Rep. 841; Louisville, etc. R. Co. *v.* Ritter, 85 Ky. 368; Central, etc. R'y. Co. *v.* Kuhn, 86 Ky. 578; Copson *v.* The Railroad, 171 Mass. 233, 50 N. E. Rep. 613; Graham *v.* The Railway, 39 Minn. 81; Railroad Co. *v.* Nichols, — Miss. —, 38 So. Rep. 371; Goffin *v.* The Railway, 102 Mo. 540, 15 S. W. Rep. 76; Estes *v.* The Railway, 110 Mo. App. 725, 85 S. W. Rep. 627; Holland *v.* The Railroad, 105 Mo. App. 117, 79 S. W. Rep. 508; Wedekind *v.* The Railroad, 20 Nev. 292, 21 Pac. Rep. 682; Rowden *v.* The Railroad, 208 Penn. St. 623, 57 Atl. Rep. 1125; Railway Co. *v.* Dawson, 98 Va. 577, 36 S. E. Rep. 996; Railroad Co. *v.* Stoner, 49 Fed. 209, 1 C. C. A. 231, 4 U. S. App. 109; Cincinnati, etc. R'y. Co. *v.* Bravard, — Ind. App. —. 76 N. E. Rep. 899; Railway Co. *v.* Green, (Tex. Civ. App.) 91 S. W. Rep. 380; McCready *v.* Railroad Co., 64 N. Y. Supp. 996.

4. Gardner *v.* The Railroad, 97 Ga. 482, 25 S. E. Rep. 334, 54 Am.

parting of the train,⁵ or by the breaking down of a bridge,⁶ or by the falling of some of the appliances within the vehicle,⁷ or by an obstruction, which the carrier has placed too near the track, striking the side of the train,⁸ a *prima facie* presumption will arise that the accident was due to the negligence of the company or its servants.⁹ So where it is shown that the injury was caused by a spark from one of the company's locomotives,¹⁰ or by a block of coal which was thrown from the tender of an engine while it was passing the depot platform,¹¹ or by the explosion of a locomotive boiler,¹² the law will presume from the mere happening of the injury that the company was guilty of negligence. And if the carriage be by water, and an accident happens, causing injury to a passenger, by the fall of a gangway,¹³ or by the bursting of a steam drum,¹⁴ or

St. Rep. 435; *Stoody v. The Railway*, 124 Mich. 420, 83 N. W. Rep. 26.

The same rule has also been applied where the car is suddenly started as the passenger is getting off. *Railway Co. v. Findley*, 76 Ga. 311; *Augusta R. Co. v. Randall*, 79 Ga. 304; *Birmingham, etc. R'y. Co. v. Hale*, 90 Ala. 8, 8 S. Rep. 142.

5. *Feldschneider v. The Railway*, 122 Wis. 423, 99 N. W. Rep. 1034.

6. *Grote v. Tre Railway*, 2 Exch. 251; *Louisville, etc. R. Co. v. Snyder*, 117 Ind. 435.

7. *Och v. The Railway*, 130 Mo. 27, 31 S. W. Rep. 962, 36 L. R. A. 442; *Jenkins v. The Railroad*, 20 Ky. Law Rep. 865, 47 S. W. Rep. 761; *Stoody v. The Railway*, 124 Mich. 420, 83 S. W. Rep. 26; *Cramblet v. The Railway*, 82 Ill. App. 542; *Weir v. Railway Co.*, 98 N. Y. Supp. 268.

8. *Carrico v. The Railroad*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; *McCord v. The Railroad*, 134 N. Car. 53, 45 S. E. Rep. 1031.

9. See, also, *Dawson v. The Railway*, 7 Hurl. & N. 1037; *Carpue v. The Railway*, 5 Ad. & El. (N. S.)

747; *Curtis v. The Railroad*, 18 N. Y. 534; *Feital v. The Railroad*, 109 Mass. 398; *Meador v. The Railway*, 62 Kan. 865, 61 Pac. Rep. 442; *McCafferty v. The Railroad*, 193 Penn. St. 339, 44 Atl. Rep. 435, 74 Am. St. Rep. 690; *Major v. The Railroad*, 21 Utah, 141, 59 Pac. Rep. 522; *Railway Co. v. Parks*, 97 Tex. 131, 76 S. W. Rep. 740; *Railway Co. v. Lauricella*, 87 Tex. 277, 28 S. W. Rep. 277, 47 Am. St. Rep. 103; *Railway Co. v. Fales*, (Tex. Civ. App.) 77 S. W. Rep. 234; *Railroad Co. v. Thompson*, (Tex. Civ. App.) 77 S. W. Rep. 439.

10. *Railroad Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. Rep. 797.

11. *Railroad Co. v. Reynolds*, 24 Ky. Law Rep. 1402, 71 S. W. Rep. 516.

12. *Kelly v. The Railway*, — Mo. App. —, 87 S. W. Rep. 583.

13. *Bartnik v. The Railroad*, 55 N. Y. Supp. 266, 36 App. Div. 246. See, also, *Louisville, etc. Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. Rep. 710.

14. *In re Navigation & Imp. Co.*, 110 Fed. 670.

by the failure of the boat's machinery to operate,¹⁵ or by the breaking of the machinery,¹⁶ or by the boat colliding with the bank,¹⁷ proof of the accident will be *prima facie* evidence of negligence on the part of the carrier. So if the passenger by stage-coach is injured by the overturning of the coach,¹⁸ or by the horses attached thereto running away,¹⁹ mere proof of the accident will be sufficient to cast upon the proprietor the burden of disproving that it was due to his negligence.²⁰

15. *Steamboat Co. v. Walker*, 120 Fed. 97, 56 C. C. A. 49.

16. *Walker v. Steamboat Co.*, 117 Fed. 784; *International, etc. R'y. Co. v. Prince*, 77 Tex. 560; *Carter v. The Railway*, 42 Fed. 57.

17. *Louisville, etc. Packet Co. v. Smith*, 22 Ky. Law Rep. 1323, 60 S. W. Rep. 524.

18. *Ware v. Gay*, 11 Pick. 106; *Farish v. Riegle*, 11 Gratt. 697; *Lawrence v. Green*, 70 Cal. 417.

19. *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; *Budd v. Carriage Co.*, 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279.

20. In *Curtis v. The Railroad*, 18 N. Y. 534, Selden, J., after stating the law substantially as stated in the text, observes that "the cases in which it has been said that a presumption of negligence arises from the mere proof that an accident has occurred, will appear, if examined, not to conflict materially with these principles; and some of them are, I think, illustrative, of the distinction just suggested. The leading cases on the subject are those of *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Peters, 181; *Carpue v. The London & Brighton Railway Company*, 5 Ad. & El. (N. S.) 747; *Laing v. Colder*, 8 Barr. 479. In *Christie v. Griggs*, where Sir James Mansfield is supposed to have laid

down the proposition in question, it was proved that the injury was caused by the breaking of the axle-tree of the coach, upon the top of which the plaintiff was seated; and it was in view of this proof that the chief justice made the remark that 'the plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he had suffered.' There is no doubt that, in such a case, negligence should be presumed for the reasons which have been given. In the case of *Stokes v. Saltonstall*, which was also an action against the proprietors of a line of stage-coaches, the court instructed the jury that the 'facts that the carriage was upset and the plaintiff's wife injured were *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver; and threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.' Taken abstractly, this instruction, which was sustained by the court, might seem to be in conflict with the principles here contended for; but if understood in reference to the proof, it is otherwise. The plaintiff had proved not only the accident and injury, but that the passengers had remarked that the driver appeared intoxicated, and so

Where, however, the injury is received while the passenger is about the carrier's premises,²¹ or, if in the vehicle, where the accident causing the injury is to him and not to the vehicle,²² or where the injury is caused while the passenger is alighting from the vehicle by his stepping upon an object which has been left upon the depot platform,²³ the mere fact of the injury will not be sufficient to charge the company with negligence. "It is only," said the court in *Stager v. The Railway*,²⁴ "when the injury occurs from agencies peculiarly with-

told the agent of the proprietors; that the road was perfectly level and not dangerous or difficult and that the reckless conduct of the driver had called out repeated remonstrances from the passengers, which were wholly unattended to. Here was ample proof of negligence; and the judge must have had these circumstances in view when he made his remarks to the jury. . . . The other two cases were actions for injuries upon railroads. In that of *Carpue v. The London & Brighton Railway*, it appeared that the position of the rails had been somewhat deranged at the spot where the injury took place; and the chief justice charged the jury that it having been shown that the exclusive management, both of the machinery and the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced. This is in perfect accordance with the principles which have been here advanced. *Laing v. Colder* is perhaps the strongest case in support of the doctrine against which we contend. When that case was heard *in banco*, Bell, J., said 'the mere happening of an injurious ac-

cident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing it did not exist.' But the charge of the judge at the circuit, upon which the question arose, was not so broad. He instructed the jury that 'in the *present case* the presumption was there had been negligence,' a charge fully justified by the proof, which was that the accident occurred while the car was crossing a bridge which was so narrow that the plaintiff's hand lying outside the car window was caught by the bridge, and his arm broken. It was palpable negligence on the part of the company so to construct the bridge. In no instance, that I am aware of, has it been said by any judge that negligence on the part of the carrier was to be presumed from the mere happening of an accident, except where the facts proved in the particular case fully warranted the presumption upon the principles here insisted upon."

21. *Herstine v. The Railroad*, 151 Penn. St. 244, 25 Atl. Rep. 104.

22. *Herstine v. The Railroad*, *supra*.

23. *Bernhardt v. The Railroad*, 159 Penn. St. 360, 28 Atl. Rep. 140.

24. *Stager v. The Railway*, 119 Penn. St. 70.

in the defendant's power that he can be presumed, without proof, to have acted negligently." So where a large rock, which had become detached from a hillside adjoining the track, rolled from its place and struck the train, causing injury to a passenger, it was held that as the fall of the rock was not connected with the construction of the road or operation of the means of transportation, no presumption would arise that the company had been guilty of negligence.²⁵

Sec. 1415. (§ 801.) Proof of injury usually makes a *prima facie* case of negligence.—It generally happens, therefore, in actions against the carrier in which his liability depends upon the finding of negligence, that, in proving the injury, the character of the accident is also shown, from which it can be seen whether there was negligence, or so strong a probability of its existence as to amount to a presumption against the carrier, and to cast upon him the burden of disproving it; and whenever it appears that the accident was of that kind which, according to common experience, does not usually occur except from some fault of the carrier himself or of his servants, or from some imperfection in his conveyance or its appliances, or from the unsafe condition of his road, a *prima facie* case is made against him, and to exonerate himself from liability he must show that the accident was inevitable, or that it could not have been avoided by the exercise of the utmost care and foresight reasonably consistent with the prosecution of his business.²⁶ Conditions, however, which might result from natural causes would present different considerations, as where the passenger, when he reached his destination, was sick or dead. In such a case something more than proof of this con-

25. *Fleming v. The Railway*, 158 Penn. St. 130, 27 Atl. Rep. 858. *road Co. v. Elder*, 57 Kan. 312, 46 Pac. Rep. 310; *Holland v. The Rail-*

26. *Railroad Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722, 30 Am. St. Rep. 65; *Larkin v. The Railway*, 118 Iowa, 652, 92 N. W. Rep. 891; *Railroad Co. v. Klein*, 43 Ill. App. 63; *Meador v. The Railway*, 62 Kan. 865, 61 Pac. Rep. 442; *Rail-* *road, 105 Mo. App. 117, 79 S. W. Rep. 508; Budd v. Carriage Co.*, 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279; *Crary v. The Railroad*, 203 Penn. St. 525, 53 Atl. Rep. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815; *Railroad Co. v. Kuhn*, 107 Tenn.

dition would be needed to charge the carrier with liability.²⁷ And where the plaintiff, instead of resting on the proof of facts which would establish a *prima facie* case against the carrier, as for instance a derailment of the carriage, proceeds to show by his own testimony just how the accident happened, such

106, 64 S. W. Rep. 202; *Railway Co. v. Harkey*, — Tex. Civ. App. —, 88 S. W. Rep. 506.

27. See *Curtis v. Railroad Co.*, and other cases cited in preceding section. In *Pennsylvania R. Co. v. Raiordon*, 119 Penn. St. 577, Williams, J., says:

"The rule in relation to the presumption of negligence against a carrier is well stated in *Laing v. Colder*, 8 Pa. 479. 'Now the mere happening of an injurious accident raises, *prima facie*, a presumption of neglect, and throws upon the carrier the *onus* of showing that it did not exist.' But the word 'accident' must be understood as referring to such happenings as the exercise of proper care by the carrier could have prevented. The machinery for transportation is under his exclusive management and control, and he contracts for its sufficiency, and for the skill and fidelity of his servants in charge of it.

"If, for any reason, an 'injurious accident' happens to, or by reason of, that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an 'injurious accident' is not shown

to exist, the presumption which arises from it cannot be invoked by a plaintiff. The contract of the carrier does not insure against death generally, but only as it may be the result of an injurious accident in the course of the carriage. A passenger may die while in his seat in a car from disease or from his own act, just as he might die in his own house from the same cause; but we have never heard it alleged that the carrier was liable in damages because of a death so happening, nor that it was his duty to show affirmatively that the death was due to causes over which he had no control. Death from natural causes can hardly be called an accident, but if it was otherwise, yet there is a very broad distinction between the case of its coming to a passenger as an individual by reason of circumstances and conditions that are personal and peculiar to him, and the case of its coming to a passenger as such by reason of accident to, or on account of, the means of transportation employed by the carrier, whether in motion or not. In the former class of cases no presumption of negligence can arise, for the facts furnish no foundation for it. In the latter there is a presumption, not conclusive, but *prima facie*, on which the plaintiff may rest, and which the carrier must overcome."

testimony must tend to prove that the accident was due to the carrier's negligence, or he will not be entitled to recover.²⁸

Sec. 1416. Same subject—How where passenger agrees to assume risk of accident.—But while proof that the passenger has received an injury through an accident connected with the means or instrumentalities employed in the transportation will be sufficient to raise a *prima facie* presumption that the accident was due to some negligent act or omission on the part of the carrier, and to cast upon him the burden of disproving that he was at fault, it has been held that no such presumption of negligence will arise where the passenger has expressly agreed to assume all risk of accident or damage to his person. The liability of the carrier, it is said in the case of *Crary v. The Railroad*,²⁹ being by such an agreement confined to its negligence, the ordinary rule that negligence is not to be presumed should apply, and the burden of proof is therefore upon the passenger to show affirmatively the specific negligence complained of. It would seem, however, that in those courts³⁰ which hold that where the carrier has by special contract undertaken to relieve himself from liability for injury due to certain excepted causes or accidents, the burden of proof rests upon him, if he will exonerate himself from liability, to show not only that the injury falls within one of the stated exceptions, but that he was free from any negligence contributing thereto, the rule announced in the *Crary* case would not be followed.

Sec. 1417. (§ 802.) Contributory negligence of passenger—Burden of proof on defendant.—The cases upon the subject are not in harmony, but by the weight of authority, it is believed, the plaintiff need only show the negligence of the carrier and the injury resulting therefrom, and will not be required to go further and show, in order to make out his case, that he himself was free from contributory negligence. The

²⁸ *Buckland v. The Railroad*, Rep. 363, 93 Am. St. Rep. 778, 59 L. 181 Mass. 3, 62 N. E. Rep. 955. R. A. 815.

²⁹ 203 Penn. St. 525, 53 Atl. ³⁰ See *ante*, § 1354.

burden of proof will then be upon the carrier to show that the injury of the passenger was attributable to his own negligence, which, upon the general principles in regard to concurring or contributory negligence, already stated,¹ will exonerate him, whether the injury has resulted in death or not.² The law will never presume negligence in the absence of evidence to show it, whether the party be charged with it or not. On the contrary, in the case of the injured passenger, a presumption would arise from the natural instinct of self-preservation, that he was, at the time of the accident, in the exercise of due care and caution for his personal safety, and that, therefore, the injury was solely attributable to the conduct of the party proven to have been in fault. And this rule prevails in Alabama,³ Arizona,⁴ California,⁵ Colorado,⁶ Georgia,⁷ Kansas,⁸ Kentucky,⁹ Maryland,¹⁰ Minnesota,¹¹ Mississippi,¹² Missouri,¹³

1. *Ante*, ch. XII.

2. *Sherman v. Stage Co.*, 24 Iowa, 515; *Citizens' Railroad v. Carey*, 56 Ind. 396; *Willets v. Railroad*, 14 Barb. 585; *Railroad v. Robinson*, 44 Penn. St. 175; *Railroad v. Ogier*, 35 *id.* 60.

3. *Nash v. The Railway*, 136 Ala. 177, 33 So. Rep. 932, 96 Am. St. Rep. 19; *North Birmingham, etc. R. Co. v. Calderwood*, 89 Ala. 247, 7 S. Rep. 360; *Mobile, etc. R. Co. v. Crenshaw*, 65 Ala. 566.

4. *Hobson v. Railroad Co.*, 2 Ariz. 171, 11 Pac. Rep. 545; *Lopez v. Mining Co.*, 1 Ariz. 464.

5. *McDougall v. Railroad Co.*, 63 Cal. 431; *Nehrbas v. Railroad Co.*, 62 Cal. 320.

6. *Sanderson v. Frazier*, 8 Colo. 79.

7. *Thompson v. The Railroad*, 54 Ga. 509.

8. *St. Louis, etc. R. Co. v. Weaver*, 35 Kans. 412; *Kansas Pac. R'y Co. v. Pointer*, 14 Kans. 38;

Kansas, etc. R. Co. v. Phillibert, 25 Kans. 583.

9. *Louisville, etc. R. Co. v. Goetz*, 79 Ky. 442; *Railroad Co. v. Thomas*, 79 Ky. 160; *Railroad Co. v. Hoehl*, 12 Bush, 41.

10. *Frech v. Railroad Co.*, 39 Md. 574; *North Central Railway v. Geis*, 31 Md. 357; *Prince George County v. Burgess*, 61 Md. 29; *State v. Railroad Co.*, 58 Md. 482.

11. *Hocum v. Wetherick*, 22 Minn. 152.

12. *Railroad Co. v. Humphrey*, 83 Miss. 721, 36 So. Rep. 154.

13. *Murray v. Railway Co.*, 101 Mo. 236; *Mitchell v. Clinton*, 99 Mo. 153; *Buesching v. Gas L. Co.*, 73 Mo. 220; *Parsons v. Railroad Co.*, 94 Mo. 286; *Hudson v. Railway Co.*, 32 Mo. App. 667; *Smith v. Railroad Co.*, 37 Mo. 287; *Thompson v. Railroad Co.*, 51 Mo. 190; *Hughes v. The Railroad*, 127 Mo. 447, 30 S. W. Rep. 127.

Nebraska,¹⁴ New Hampshire,¹⁵ New Jersey,¹⁶ Ohio,¹⁷ Oregon,¹⁸ Pennsylvania,¹⁹ Rhode Island,²⁰ South Carolina,²¹ Texas,²² Vermont,²³ Washington,²⁴ West Virginia,²⁵ Wisconsin,²⁶ the District of Columbia,²⁷ and the Supreme Court of the United States.²⁸ But where the evidence adduced by the plaintiff is such as to raise a *prima facie* presumption that the injury was contributed to by his own negligence, the rule will not apply, and the burden of proof will be upon him to show that he was free from negligence.²⁹

Sec. 1418. (§ 803.) Same subject—Cases holding that burden of proof is on plaintiff.—There are, however, many de-

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| <p>14. <i>Lincoln v. Walker</i>, 18 Neb. 244; <i>Durrell v. Johnson</i>, 31 Neb. 793, 48 N. W. Rep. 890.</p> <p>15. <i>Smith v. Railroad Co.</i>, 35 N. H. 366; <i>White v. Railroad Co.</i>, 30 N. H. 207.</p> <p>16. <i>New Jersey, etc. Co. v. Nichols</i>, 33 N. J. L. 434; <i>Durant v. Palmer</i>, 5 Dutch. 544; <i>Delaware, etc. R. Co. v. Taffey</i>, 38 N. J. L. 527.</p> <p>17. <i>Baltimore, etc. R. Co. v. Whitacre</i>, 35 Ohio St. 627.</p> <p>18. <i>Grant v. Baker</i>, 12 Or. 329.</p> <p>19. <i>Cleveland, etc. R. Co. v. Rowan</i>, 66 Penn. St. 393; <i>Hays v. Gallagher</i>, 72 Penn. St. 136; <i>Pennsylvania R. Co. v. Weber</i>, 76 Penn. St. 157; <i>Bradwell v. Railroad Co.</i>, 139 Penn. St. 404, 20 Atl. Rep. 1046.</p> <p>20. <i>Cassidy v. Angell</i>, 12 R. I. 447.</p> <p>21. <i>Crouch v. Railway Co.</i>, 21 S. C. 495; <i>Carter v. Railroad Co.</i>, 19 S. C. 20.</p> <p>22. <i>Dallas, etc. R. Co. v. Spickler</i>, 61 Tex. 427; <i>Houston, etc. R. Co. v. Cowser</i>, 57 Tex. 293; <i>St. John v. The Railway</i>, (Tex. Civ. App.) 80 S. W. Rep. 235; <i>Missouri, etc. R'y. Co. v. Gist</i>, 31 Tex. Civ. App. 662, 73 S. W. Rep. 857; <i>Pares v.</i></p> | <p><i>The Railway</i>, (Tex. Civ. App.) 57 S. W. Rep. 301.</p> <p>23. <i>Walker v. Westfield</i>, 39 Vt. 246; <i>Hill v. New Haven</i>, 37 Vt. 501.</p> <p>24. <i>Northern Pac. R'y. Co. v. Hess</i>, 2 Wash. 383, 26 Pac. Rep. 866.</p> <p>25. <i>Fowler v. The Railroad</i>, 18 W. Va. 579; <i>Carrico v. The Railway</i>, 35 W. Va. 389, 14 S. E. Rep. 12.</p> <p>26. <i>Milwaukee, etc. R. Co. v. Hunter</i>, 11 Wis. 160; <i>Achtenhagen v. Watertown</i>, 18 Wis. 331; <i>Hoth v. Peters</i>, 55 Wis. 405; <i>Randall v. Trans. Co.</i>, 54 Wis. 147; <i>Hoyt v. City of Hudson</i>, 41 Wis. 105.</p> <p>27. <i>Tolson v. Coasting Co.</i>, 6 Mackey, 37.</p> <p>28. <i>Hough v. Railroad Co.</i>, 100 U. S. 213; <i>Indianapolis, etc. R. Co. v. Holst</i>, 93 U. S. 291; <i>Railroad Co. v. Harmon</i>, 147 U. S. 571.</p> <p>29. <i>North Birmingham R. Co. v. Calderwood</i>, 89 Ala. 247, 7 S. Rep. 360; <i>Durrell v. Johnson</i>, 31 Neb. 796, 48 N. W. Rep. 890; <i>Paterson v. Railroad Co.</i>, 85 Ga. 653, 11 S. E. Rep. 872; <i>Gillum v. Steamship Co.</i>, (Tex. Civ. App.) 76 S. W. Rep. 232; <i>Railway Co. v. Martin</i>, 26 Tex. Civ. App. 231, 63 S. W. Rep. 1089.</p> |
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cisions to the contrary upon this question, holding it to be incumbent upon the plaintiff, in an action for damages for an injury sustained by him through the negligence of another, to prove that he himself was in the exercise of due care at the time of the occurrence of the accident. Such is the rule in Connecticut,³⁰ Illinois,³¹ Indiana,³² Iowa,³³ Louisiana,³⁴ Maine,³⁵ Massachusetts,³⁶ Michigan,³⁷ Montana,³⁸ New York,³⁹ and North Carolina.⁴⁰

Sec. 1419. (§ 803a.) To defeat recovery plaintiff's negligence must have been a proximate cause of injury.—But to

30. *Button v. Frink*, 51 Conn. 342; *Fox v. Glastenbury*, 29 Conn. 204; *Birge v. Gardner*, 19 Conn. 507; *Brockett v. The Railroad*, 73 Conn. 428, 47 Atl. Rep. 763.

31. *Kepperley v. Ramsden*, 83 Ill. 354; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Galena, etc. R. Co. v. Fay*, 16 Ill. 558; *Railroad Co. v. Morain*, 36 Ill. App. 632; *s. c.* 140 Ill. 117, 29 N. E. Rep. 869; *Railway Co. v. Hubbard*, 106 Ill. App. 462; *Railway Co. v. Rielly*, 40 Ill. App. 416.

32. *Cincinnati, etc. R. Co. v. Butler*, 103 Ind. 31; *Lyons v. Railroad Co.*, 101 Ind. 419; *Louisville, etc. R. Co. v. Lockridge*, 93 Ind. 191; *City of Fort Wayne v. De Witt*, 47 Ind. 391; *Jackson v. Railroad Co.*, 47 Ind., 454; *Evansville, etc. R. Co. v. Hiatt*, 17 Ind. 102; *Railway Co. v. Miller*, 141 Ind. 533, 37 N. E. Rep. 343; *Wahl v. Shoulters*, 14 Ind. App. 665, 43 N. E. Rep. 458; *Railroad Co. v. Weikle*, 6 Ind. App. 340, 33 N. E. Rep. 639.

33. *Slosson v. Railroad Co.*, 51 Iowa, 294; *Bonce v. Railroad Co.*, 53 Iowa, 278; *Murphy v. Railroad Co.*, 45 Iowa, 661; *Benton v. Railroad Co.*, 42 Iowa, 192.

34. *Moore v. Shreveport*, 3 La. Ann. 645.

35. *Chase v. Railroad Co.*, 77 Me. 62; *State v. Railroad Co.*, 76 Me. 357; *Benson v. Titcomb*, 72 Me. 31; *Day v. The Railroad*, 96 Me. 207, 52 Atl. Rep. 771, 90 Am. St. Rep. 335.

36. *Corcoran v. Railroad Co.*, 133 Mass. 507; *Hinckley v. Railroad Co.*, 120 Mass. 257; *Wheelwright v. Railroad Co.*, 135 Mass. 225; *Riley v. Railroad Co.*, 135 Mass. 293; *Stock v. Wood*, 136 Mass. 353; *Copson v. The Railroad*, 171 Mass. 233, 50 N. E. Rep. 613.

37. *Guggenheim v. Railway Co.*, 66 Mich. 150; *Mitchell v. Railway Co.*, 51 Mich. 236; *Chicago, etc. R'y Co. v. Smith*, 46 Mich. 504; *Brown v. Railway Co.*, 49 Mich. 153; *Henry v. Railway Co.*, 49 Mich. 495; *Lake Shore R. Co. v. Miller*, 25 Mich. 274; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 99.

38. *Taillon v. Mears*, 29 Mont. 161, 74 Pac. Rep. 421.

39. *Tolman v. Railroad Co.*, 98 N. Y. 198; *Lee v. Gas Co.*, 98 N. Y. 115; *Hart v. Bridge Co.*, 84 N. Y. 56.

40. *Owens v. Railroad Co.*, 88 N. C. 502; *Doggett v. Railroad Co.*, 78 N. C. 305; *Manly v. Railroad Co.*, 74 N. C. 655.

defeat the plaintiff's recovery, his negligence must have been a proximate cause of the injury.⁴¹ It need not, however, be the sole cause; it is sufficient if it is one of two or more concurring causes.⁴²

Sec. 1420. How question of contributory negligence determined.—Where the evidence is in conflict, or, if not in dispute, is such that reasonable minds may fairly draw different conclusions as to whether the injury sustained by the passenger was contributed to by his own imprudence or carelessness, the question of his contributory negligence is properly one for the jury. If, however, the facts are not in dispute, and these facts as admitted or proved show so clearly that the passenger's own negligence contributed to the injury that there can be no reasonable difference of opinion in regard to it, the question of the carrier's liability may be decided as one of law by the court.⁴³ And in determining these questions it must be borne in mind, as already stated, that the relations existing between the carrier and a passenger are different from those between the carrier and a stranger, and that the passenger has constantly the right to rely upon the presumption that the carrier will not neglect his duty to him or expose him needlessly to danger or injury.⁴⁴

41. *McAunich v. The Railroad*, 20 Iowa, 358; *Pitzner v. Shinnick*, 39 Wis. 129; *Gunter v. Wicker*, 85 N. C. 310; *Doggett v. Railroad Co.*, 78 N. C. 305; *Louisville, etc. R. Co. v. Wolfe*, 80 Ky. 82; *Palys v. Railroad Co.*, 30 N. J. Eq. 604; *Dudley v. Ferry Co.*, 45 N. J. L. 368; *Barbee v. Reese*, 60 Miss. 906; *Fernandes v. Railroad Co.*, 52 Cal. 45; *Towler v. Railroad Co.*, 18 W. Va. 579.

42. *North Birmingham, etc. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. Rep. 360.

43. *Orcutt v. Railway Co.*, 85 Cal. 291; *Franklin v. Road Co.*, 85 Cal. 63; *Kansas City, etc. R. Co. v. Smith*, 92 Ala. 237, 8 S. Rep. 43;

Apsey v. Railroad Co., 83 Mich. 440.

44. In *Franklin v. Road Co.*, 85 Cal. 63, the court say: "Negligence is not absolute, but is relative to the circumstances surrounding the case. *Richardson v. Kier*, 34 Cal. 63; *Needham v. Railroad Co.*, 37 Cal. 410. It always relates to some circumstance of time, place and person, and whether there was contributory negligence in any given case is generally a question for the jury to pass upon and determine. *Jamison v. Railroad Co.*, 55 Cal. 593. It is generally an inference, from facts and circumstances, which it is the province of the jury to find, and nonsuit on

4. *The measure of damages.*

Sec. 1421. Measure of damages is generally compensation for injury.—Owing to the fact that the damages sustained by the passenger usually result from an injury inflicted upon the person, it is impossible in the great majority of cases to distinguish between the consequences of a breach of the contract to carry and those arising from a tort. The result is that to lay down any fixed rules for computing damages, which would be applicable to each form of action, would be extremely difficult. Of course, special damages arising from a breach of the contract to carry, such as for loss of profits or injury to business, may, under the rule laid down in *Hadley v. Baxendale*,⁴⁵ be recovered, and notice to the carrier at the time the contract for carriage is made of the special circumstances from which such damages will arise

the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in her favor must be set aside. *Schierhold v. Railroad Co.*, 40 Cal. 447. . . . Carriers owe more than an ordinary duty to their passengers (*Jamison v. Railroad Co.*, *supra*), and negligence cannot be imputed to a passenger, such as the plaintiff was, for that she did not anticipate culpable negligence on the part of the carrier. She had a right to act on the presumption that the employees of the defendant would use the degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances. *Robinson v. Railroad Co.*, 48 Cal. 421. In this case the defendant had negligently and wrongfully carried the plaintiff beyond and away from all its usual stopping places, where it was ac-

customed to receive or discharge passengers, into what was practically its switching yard, where there were no accommodations for passengers to get on or off its cars, and to a point where defendant knew, though the plaintiff may not have known, that there was special risk and hazard. Under such circumstances it was defendant's duty to use every precaution for her protection. Whether it did so or not was a proper question to be submitted to the jury; and it was equally for the jury to determine whether she, with such knowledge as she possessed of the peril of the place, and with the presumptions she was entitled to indulge as to the degree of care which the employees of defendant would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury."

45. 9 Exch. 341. See sec. 1367.

will frequently affect the amount to which the passenger is entitled. In general, however, it may be said that the damages to which the passenger, who has been injured, is entitled, must be measured by the rules of compensation.⁴⁶ But the elements which enter into the question of compensation are so various, and in themselves so uncertain, that it furnishes in most cases only a rule for approximation of the actual damage, and much must after all be left to the sound discretion of those whose province it is to decide upon its amount. Certain principles, however, have been settled as to what may be properly included within the meaning of the term compensation which will serve as guides in the calculation.

Sec. 1422. (§ 805.) Compensation for pain and suffering.—

One of these rules is that the compensation of the injured party will not be confined to his mere pecuniary loss, but may embrace recompense for the pain and suffering of both body and mind which have resulted from the injury.⁴⁷ And the jury may take into consideration future as well as past physical pain and suffering. But to justify them in doing so, it must be made reasonably certain that such future pain and suffering are inevitable, and if they be only probable or uncertain, they cannot be taken into the estimate.⁴⁸

46. Thus where the carrier has failed to carry the passenger to his destination, the measure of damages would ordinarily be what it would cost him to get to that point in the most feasible manner. *Rose v. King*, 78 N. Y. Supp. 419, 76 App. Div. 308.

47. *Ransom v. The Railroad*, 15 N. Y. 415; *Morse v. The Railroad*, 10 Barb. 621; *West v. Forest*, 22 Mo. 344; *Bannon v. The Railroad*, 24 Md. 108; *Lawrence v. The Railroad*, 29 Conn. 390; *Fairchild v. The Stage Co.*, 13 Cal. 599; *Canal Co. v. Graham*, 63 Penn. St. 290; *Smith v. Holcomb*, 99 Mass. 552; *Holyoke v. The Railway*, 48 N. H.

541; *Smith v. Overby*, 30 Ga. 241; *Cox v. Vanderkleed*, 21 Ind. 164; *Wright v. Compton*, 53 *id.* 337; *Penn. R. R. v. Allen*, 53 Penn. St. 276; *Swarthout v. The Steamboat Co.*, 48 N. Y. 209, 46 Barb. 222; *Quinn v. Railroad Co.*, 34 Hun, 331; *Dorrah v. Railroad Co.*, 65 Miss. 14; *Dougherty v. Railroad Co.*, 97 Mo. 647; *Cone v. The Railroad*, 62 N. J. Law, 99, 40 Atl. Rep. 780; *Southern Pacific Co. v. Maloney*, 136 Fed. 171.

48. *Curtis v. The Railroad*, 18 N. Y. 534; *Aaron v. The Railroad*, 2 Daly, 127. In *Smith v. The Railway Company*, 23 Ohio St. 10, it was held that in estimating the

Sec. 1423. (§ 806.) Future damages may be considered.—

And not only the present loss, or that which has already accrued from the incapacity of the injured party to attend to his ordinary pursuits, and the reasonable expense which he has incurred for medical attention, and other outlays which have been made necessary by the injury, are to be considered, but, as only one action can be brought and but one recovery can be had, it is proper to include in the amount of damages compensation for whatever it may be reasonably certain the plaintiff will suffer from future incapacity or loss of health, as the result of his injury; and he may recover for the loss of capacity for attention to his ordinary business, whether it be physical or mental, present or prospective.¹ The state of health of the party injured is a

damages sustained by the plaintiff, "the injury to the feelings caused by a public expulsion from the cars" was a proper subject for the consideration of the jury, even though they might be limited to compensatory damages only.

1. Toledo, etc. R'y. Co. v. Baddeley, 54 Ill. 19; Railroad Co. v. Weldon, 52 Ill. 290; Howell v. Goodrich, 69 Ill. 556; Frink v. Schroyer, 18 Ill. 416; Russ v. The War Eagle, 14 Iowa, 363; Kansas, etc. R'y. Co. v. Pointer, 9 Kan. 620; Smiley v. The Railway, 160 Mo. 629, 61 S. W. Rep. 667; Holyoke v. The Railway, 48 N. H. 541; Drew v. The Railroad, 26 N. Y. 49; McIntyre v. The Railroad, 37 N. Y. 287, 47 Barb. 515; Horowitz v. Packet Co., 41 N. Y. Supp. 54, 18 Misc. Rep. 24; Smedley v. The Railway Co., 184 Penn. St. 620, 39 Atl. Rep. 544; Railway Co. v. Donahue, 70 Penn. St. 119; Railroad Co. v. Goodman, 62 Penn. St. 329; International, etc. R. Co. v. Clark, 96 Tex. 349, 72 S. W. Rep. 584; s. c. 71 S. W. Rep. 587; St. Louis, etc. R'y. Co. v. Byers, 6 Tex. Ct.

Rep. 36, 70 S. W. Rep. 558; Railway Co. v. Shelton, 30 Tex. Civ. App. 72, 69 S. W. Rep. 653; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766; The City of Portsmouth, 125 Fed. 264; Railroad Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Railroad Co. v. Davidson, 76 Fed. 517, 22 C. C. A. 306; s. c. 64 Fed. 301, 12 C. C. A. 118, 24 U. S. App. 354; Weisenberg v. City of Appleton, 26 Wis. 56; Potter v. The Railway, 21 Wis. 372; Houston, etc. R'y. Co. v. McCarty, — Tex. Civ. App. —, 89 S. W. Rep. 805.

Where the carrier sells a ticket for a drawing room on a sleeping car and fails to supply such accommodation, injury to health by reason of the carrier's breach of contract may fairly be said to be within the contemplation of the parties. Ingraham v. Pullman Co., — Mass. —, 76 N. E. Rep. 237.

But future damages must not be merely speculative and problematical. Louisville, etc. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. Rep. 357, 29 Am. St. Rep. 378. They

proper subject of inquiry and proof;² also, in case of death from the injury, what was the probable duration of his life.³ And evidence is admissible to show what the plaintiff was earning in his business, at the time of the accident from which the injury arose, with a view of computing his loss from being rendered incapable of attending to it.⁴ But the opinions of witnesses as to the amount of loss thus sustained are inadmissible.⁵ Nor will it be competent to show, merely with a view of increasing the amount of damages where they can be only compensatory, the peculiar circumstances of the plaintiff, or the number of his family dependent upon him for support, without showing the amount of his earnings.⁶ The defendant may show that the plaintiff's business was unlawful.⁷ But the defendant will not be per-

must be confined to such as the evidence renders reasonably certain will result from the injury. *McBride v. The Railway*, 72 Minn. 291, 75 N. W. Rep. 231; *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. Rep. 128; *Hall v. The Railway*, 115 Iowa, 18, 87 N. W. Rep. 739.

2. *Birkett v. The Railway*, 4 H. & N. 730; *McCready v. The Railroad*, 64 N. Y. Supp. 996, 51 App. Div. 338.

3. *Railroad v. State*, 33 Md. 542; *Rowley v. Railway*, L. R. 8 Exch. 221; *Railroad v. Johnson*, 38 Ga. 409; *David v. Railroad*, 41 Ga. 223; *Donaldson v. Railroad*, 18 Iowa, 280; *Railway Co. v. Baier*, 37 Neb. 235, 55 N. W. Rep. 913.

4. *Dougherty v. Railroad Co.*, 97 Mo. 647; *Beisiegel v. The Railroad*, 40 N. Y. 9; *Caldwell v. Murphy*, 1 Duer, 233; *City of Ripon v. Bittel*, 30 Wis. 614; *Ballou v. Farnum*, 11 Allen, 73; *Wade v. Leroy*, 20 How. 34; *Nebraska City v. Campbell*, 2 Black. 590; *Sturgis v. Frost*, 56 Ga. 188; *Hanover R. R. v. Coyle*, 55 Penn. St. 396; *Johnston v. The Railway*, (1904) 2 K. B. 250, 73 L.

J. K. B. 568; *Railway Co. v. Humble*, 181 U. S. 57; s. c. 97 Fed. 837, 38 C. C. A. 502; *Railway Co. v. Hall*, 100 Fed. 760, 41 C. C. A. 50; *Railway Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. Rep. 990; *Railway Co. v. Posten*, 59 Kan. 449, 53 Pac. Rep. 465; *Paquin v. Railway Co.*, 90 Mo. App. 118.

The fact that plaintiff's employer made no deduction from his salary for time lost by reason of the accident will not prevent the plaintiff from recovering for the loss of time from the carrier. *Mo. Pac. R'y. v. Jarrard*, 65 Tex. 560. Nor will the fact that at the time of the injury the plaintiff happened to be out of business deprive him of the right to recover for loss of time. *Railway Co. v. Humble, supra*.

5. *Lincoln v. The Railroad*, 23 Wend. 425.

6. *Chicago v. O'Brennan*, 65 Ill. 160; *Stockton v. Frey*, 4 Gill, 406; *Shea v. The Railroad*, 44 Cal. 414.

7. *Jacques v. The Railroad*, 41 Conn. 61; *Indianapolis, etc., R'y Co. v. Bush*, 101 Ind. 582.

mitted to offset the damages sustained by the plaintiffs by any benefit they may have derived from a life or accident insurance policy.⁸ The American cases apply this rule without reference to the distinction between cases brought under the statute and those brought under the common-law rules. In England, however, this ruling is limited to suits brought at common law by the plaintiff who has been injured;⁹ while in cases under Lord Campbell's Act, the rule of ascertaining the exact pecuniary loss to the next of kin admits the benefits derived from insurances to consideration.¹⁰ This difference between the English and American rules on this subject is noted in *Harding v. Townshend*,¹¹ where the cases illustrating the common-law rule are collected.

Sec. 1424. (§ 807.) Inconvenience may be considered.—

So the inconvenience to which a passenger has been put, or the annoyance to which he has been subjected, as the direct and natural consequence of the wrongful act of the carrier, may be taken into consideration in connection with any pecuniary loss he may have sustained thereby, in fixing the amount of damages to which he is entitled; and it has been held that such personal inconvenience, from which the passenger has suffered discomfort as its immediate consequence, may be made the substantive ground of an action for damages, regardless of any expense to which he may have been put, and without reference to loss of time or money.¹² This rule has frequently been applied in cases

8. *Althorf v. Wolfe*, 22 N. Y. 355; *Railway v. Thompson*, 56 Ill. 138; *Harding v. Townshend*, 43 Vt. 536; *Kellogg v. Railroad Co.*, 79 N. Y. 72; *North Penn. R. Co. v. Kirk*, 90 Penn. St. 15; *Railroad Co. v. Carothers*, 23 Ky. Law Rep. 1673, 65 S. W. Rep. 833; *Mo., etc., R'y Co. v. Flood*, (Tex. Civ. App.) 79 S. W. Rep. 1106.

Nor will the defendant be permitted to show that on account of the death of the parent, the children were benefitted by the parent's death by receiving their re-

spective shares of his estate. *Stahler v. The Railway*, 199 Penn. St. 383, 49 Atl. Rep. 273, 85 Am. St. Rep. 791.

9. *Bradburn v. Railway*, L. R. 10 Exch. 1.

10. *Hicks v. Railway*, note to 4 Best & S. 403.

11. 43 Vt. 536.

12. *Hobbs v. The Railway*, L. R. 10 Q. B. 111; *The Aberfoyle*, 1 Blatch. 360. See, also, *The Wilamette*, 71 Fed. 712; *Railroad v. Strickland*, 90 Ga. 562, 16 S. E. Rep. 352; *Texas, etc., R'y Co. v.*

where a passenger has been negligently set down before reaching his station or carried beyond it; also, where the carrier has failed to stop the train a sufficient time for the passenger, who has secured the right to ride, to board it.¹³ In these cases he is clearly entitled to recover for the trouble, inconvenience and expense incurred in getting to his destination,¹⁴ and, as will be seen in a later section,¹⁵ he is held entitled, in many cases, to compensation for the incidental injury he has sustained. But where the carrier fails to perform the contract, and leaves the passenger at a place short of his destination, damages for disappointment resulting from the delay are too remote to be recovered.¹⁶

Sec. 1425. (§ 808.) Suffering must be real.—But the grievance for which the action is brought must have been one from which the plaintiff was a real sufferer. Thus, in an action against the captain of a ship for not furnishing good and wholesome provisions to a passenger on a voyage, Lord Denman, in his charge to the jury, told them that although he thought the captain did not supply so large a quantity of food or fresh provisions as usual under such circumstances, there was no real ground for complaint, no right of action, unless the plaintiff had been really a sufferer; “for it is not,” said he, “be-

Bratcher, (Tex. Civ. App.) 78 S. W. Rep. 531; *Railway Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. Rep. 201.

13. *Railroad Co. v. Reeves*, 25 Ky. Law Rep. 2236, 80 S. W. Rep. 471.

14. *East Tenn., etc., R. Co. v. Lockhart*, 79 Ala. 315; *Hot Springs, etc., R. Co. v. Deloney*, 65 Ark. 177, 45 S. W. Rep. 351, 67 Am. St. Rep. 913; *Railway Co. v. Quillen*, 22 Ind. App. 496, 53 N. E. Rep. 1024; *Railway Co. v. Rinicker*, 17 Ind. App. 619, 47 N. E. Rep. 239; *Railroad Co. v. Guy*, 18 Ky. Law Rep. 750, 37 S. W. Rep. 1043; *Northern, etc., R'y Co. v. O'Conner*, 76 Md.

207, 24 Atl. Rep. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; *Miller v. King*, 166 N. Y. 394, 59 N. E. Rep. 1114; s. c. 58 N. Y. Supp. 1145; *International, etc., R. Co. v. Evans*, 30 Tex. Civ. App. 252, 70 S. W. Rep. 351; *Railway Co. v. Hartnett*, (Tex. Civ. App.) 34 S. W. Rep. 1057; *Boehm v. The Railway*, 91 Wis. 592, 65 N. W. Rep. 506; *Texas, etc., R'y Co. v. Ludlam*, 52 Fed. 94, 2 C. C. A. 633, 2 U. S. App. 342.

15. See *post*, § 1429.

16. *Turner v. The Railway*, 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. Rep. 883.

cause a man does not get so good a dinner as he might have had, that he is, therefore, to have a right of action against the captain who does not provide all that he ought; you must be satisfied that there was a real grievance sustained by the plaintiff.”¹⁷

Sec. 1426. Measure of damages for delay in transporting the passenger.—If the carrier has no notice of the purpose the passenger has in view in making a journey, and it negligently fails to carry him within a reasonable time to his destination, the damages which he may recover from the carrier are such as will reasonably compensate him for the time lost, the value of which is to be determined by the reasonable value of his services in his ordinary occupation, and for the necessary expenses incurred by reason of the delay.¹⁸ But the value of the time thus lost is not to be measured by the largest sums the passenger has earned during an equal period of time, nor by the smallest sums earned during such a period, but by an average of what he has earned for a reasonable period next preceding the time of the delay.¹⁹ And while the passenger who has been deprived of the fruits of his labor through the failure of the carrier to perform the contract to carry him to his destination may recover the reasonable value of his services at the point of destination, it being shown that there was a continuous demand at destination for such services as he was fitted to perform,²⁰ he cannot recover the amount of wages or profits which he might have earned at such point, but for the carrier’s delay, where it is shown that he had no knowledge of what occupation he would procure or of the business in which he would engage.²¹

17. *Young v. Fewson*, 8 Car. & P. 55. 814, 58 C. C. A. 176; *Railroad Co. v. Byrne*, 205 Ill. 9, 68 N. E. Rep. 720.

18. *Railroad Co. v. Head*, — Ky. Law Rep. —, 84 S. W. Rep. 751. See, also, *Duggan v. Railroad Co.*, 159 Penn. St. 248, 28 Atl. Rep. 186, 39 Am. St. Rep. 672; *Malone v. Railroad Co.*, 152 Penn. St. 390, 25 Atl. Rep. 638; *Turner v. Railway Co.*, 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. Rep. 883; *Pennsylvania Co. v. Scofield*, 121 Fed. 19. *Cooley v. The Railroad*, 81 N. Y. Supp. 692, 40 Misc. 239. 20. *Ransberry v. Transportation, etc., Co.*, 22 Wash. 476, 61 Pac. Rep. 154. 21. *North American, etc., Co. v. Morrison*, 178 U. S. 262, 44 L. Ed. 1061.

Sec. 1427. Damages for mental suffering—Fright.—The rule is well settled, that if, through the negligence of the carrier, the passenger has received some physical or bodily injury, he is entitled to recover damages not only for the injury, but for the mental suffering or pain of mind which results naturally and proximately from the injury.²² Where, however, no physical injury has been inflicted upon the passenger, many courts follow the rule that damages for mental pain or suffering, although produced by some negligent act or omission on the part of the carrier, cannot be allowed.²³ But if the circumstances show that the passenger has been subjected through the carrier's negligence, to abuse, insult or malicious treatment, it is held in the majority of cases that any consequent mental pain or suffering which the passenger endures is a proper element to consider in estimating compensatory damages. Thus it is held that where the passenger has been wrongfully ejected from the carrier's vehicle,²⁴ or where he has been subjected to indignities either at

22. *Homans v. The Railway*, 180 Mass. 456, 62 N. E. Rep. 737, 57 L. R. A. 291; *Railroad Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; *Smitson v. Railway Co.*, 37 Or. 74, 60 Pac. Rep. 907.

23. *Rawlings v. The Railroad*, 97 Mo. App. 511, 71 S. W. Rep. 535; *Snyder v. The Railroad*, 85 Mo. App. 495; *Deming v. The Railroad*, 80 Mo. App. 152; *Strange v. The Railroad*, 61 Mo. App. 586; *Railway Co. v. Story*, 63 Ill. App. 239; s. c. 104 Ill. App. 132; *Railroad Co. v. Siddons*, 53 Ill. App. 607; *Stevenson v. Imp. Co.*, 22 Wash. 84, 60 Pac. Rep. 51; *Maynard v. Navigation Co.*, — Or. —, 78 Pac. Rep. 983; *Smith v. Cable Co.*, 174 Mass. 576, 55 N. E. Rep. 380, 75 Am. St. Rep. 374, 47 L. R. A. 323; *Spade v. The Railroad*, 168 Mass. 285, 47 N. E. Rep. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512.

24. *Curtis v. The Railway*, 87

Iowa, 622, 54 N. W. Rep. 339; *Railway Co. v. Biddle*, 17 Ky. Law Rep. 1363, 34 S. W. Rep. 904; *Railway Co. v. Kaiser*, 82 Tex. 144, 18 S. W. Rep. 305; *Houston, etc., R. Co. v. McNeel* (Tex. Civ. App.), 76 S. W. Rep. 206; *Missouri, etc., Ry. Co. v. Tarwater*, 3 Tex. Ct. Rep. 159, 75 S. W. Rep. 937; *Railroad Co. v. McKenzie* (Tex. Civ. App.), 41 S. W. Rep. 831; *Ammons v. Railway Co.*, 138 N. Car. 555, 51 S. E. Rep. 127; s. c. 52 S. E. Rep. 731. But see, *contra*, *Railroad Co. v. Dalton*, 65 Kan. 661, 79 Pac. Rep. 645.

Where the carrier failed to furnish the passenger with a ticket entitling him to ride to his destination, and the conductor put him off the train at an intermediate station where yellow fever was prevailing, the carrier's agent having knowledge of the existence of yellow fever at such point, it was

the hands of the carrier's servants or through the conduct of fellow passengers which the carrier's servants could have prevented,²⁵ damages for the mental pain and distress which the passenger suffers may properly be awarded. So the mental distress occasioned a passenger by his being falsely arrested on the charge of the carrier's servants that he is a disorderly person is a proper element of damage.²⁶

As a general rule, no recovery can be had for the effect of mere fright which is not accompanied by some actual bodily injury.²⁷

held that the carrier, in an action against him for a breach of the contract, was liable to the passenger for the fear and uneasiness suffered because of the prevalence of yellow fever in the locality. *Railroad Co. v. Foster*, 134 Ala. 244, 32 So. Rep. 773, 92 Am. St. Rep. 25.

The rule, as followed by the courts of Texas, is that mental anguish is an element of damage, when occasioned by a breach of contract, where the carrier had knowledge of the facts from which mental anguish would naturally follow; that mental anguish in cases of tort is not an element of damage unless accompanied by some bodily injury. *International, etc., R. Co. v. Sammon* (Tex. Civ. App.), 79 S. W. Rep. 854. See, also, *International, etc., R. Co. v. Anchonda*, 5 Tex. Ct. Rep. 289, 68 S. W. Rep. 743.

Mental anguish and suffering occasioned by the inability of a passenger to get to the bedside of a dying relative, on account of his being put off the train, are too remote for damages to be recovered. *Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. Rep. 351, 67 Am. St. Rep. 913.

In *Missouri, etc., Ry. Co. v.*

Welch (Tex. Civ. App.), 94 S. W. Rep. 333, a mileage ticket was dishonored by a second conductor because the first conductor had failed to give the passenger a slip authorizing her to be carried to destination. Mental suffering arising out of the fact that she was compelled to borrow from another passenger was held too remote to act as a basis for damages.

25. *St. Louis, etc., Ry. Co. v. Wright* (Tex. Civ. App.), 84 S. W. Rep. 270; *International, etc., R. Co. v. Henderson* (Tex. Civ. App.), 82 S. W. Rep. 1065; *Railroad Co. v. Giesen* (Tex. Civ. App.), 69 S. W. Rep. 653.

26. *Texas, etc., R. Co. v. Dean*, 98 Tex. 517, 85 S. W. Rep. 1135, *affirming* (Tex. Civ. App.) 82 S. W. Rep. 524.

27. *Homans v. The Railway*, 180 Mass. 456, 62 N. E. Rep. 737, 57 L. R. A. 291; *Railway Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. Rep. 917; *Ewing v. The Railway*, 147 Penn. St. 40, 23 Atl. Rep. 340, 14 L. R. A. 666; *Haile's Curator v. The Railroad*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774, 23 U. S. App. 80.

If a passenger receives no bodily injury in an accident for which the carrier is responsible, but becomes

But a nervous shock may in itself be so great as to cause bodily injury, and when such is the case, and it follows as an ordinary and natural result of an accident for which the carrier is responsible, it may be considered by the jury as an element of damage.²⁸

Sec. 1428. (§ 809.) Damages must be proximate and natural consequence of the injury.—The damages to which the carrier can be made liable must, however, be the proximate and natural consequence of the injury. It will therefore frequently become important to determine whether the damages are so directly the result of the wrongful act of the carrier as to fix upon him liability for compensation. This subject came up for discussion in the court of Queen's Bench in England in the case of *Hobbs v. The Railway*,²⁹ and the same rule was applied as to the test of liability as in an action for damages for delay in the transportation of goods; that is, they must be such that they may be fairly taken to have been contemplated by the parties as the probable result of the breach of the contract. The facts were that the plaintiffs, a man and his wife, became passengers upon the railway to a certain station near their home, but were wrongfully carried to a different station at a much greater distance from it, whereby they were compelled to walk a considerable distance late at night, and were put otherwise to great inconvenience, in consequence of all which the wife was made sick, became unable to attend to her domestic affairs, and suffered greatly in body and mind. The action was for a breach of the contract to carry, and damages were asked for the inconvenience to which they had been put and for the sickness of the wife. It was agreed by all the judges that for the inconvenience to which the plaintiff had been put by the fault of the carrier they might recover, but that the damages arising from

insane on account of the hardship attending the experience, the carrier, because he could not anticipate such a consequence, would not be liable in damages for the in-

sanity thus produced. *Haile's Curator v. The Railway*, *supra*.

28. *Railroad Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

29. L. R. 10 Q. B. 111.

the sickness of the wife could not be allowed because too remote; and all the judges, after admitting the great difficulty in laying down any principle or rule to cover all cases, thought the nearest approach to it which could be made was, that only such damages should be given as were fairly within the contemplation of the parties as the possible result of the breach of the contract at the time it was made, or such as might reasonably be expected to arise naturally and directly therefrom.³⁰ And this

30. "Therefore," said Cockburn, C. J., "you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that, I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night, and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could fairly be said to have been in the contemplation of the parties. As my brother Blackburn points out, so far as the incon-

venience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to his destination somehow or other. If there are means of conveyance for getting there, he may take those means, and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately, that the damage resulting must be admitted to be fair subject-matter of damages. But in this case, the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it; and if in such a case, the party recovered damages by reason of the

cold caught incidentally on that foot journey, it would be necessary, on the principle so applied, to hold that in the two cases which have been put in the course of the discussion, the party aggrieved would be equally entitled to recover. And yet the moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: Suppose in walking home on a dark night, the plaintiff made a false step, and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that that is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or indeed a great many more times, from Esher to Hampton, without falling down and breaking a limb; therefore it could not be contended that that could have been anticipated as the likely and probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of these causes, it might be said: 'If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk, or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage.' In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable conse-

quence of a person being put down at an improper place and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties, so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences."

And per Blackburn, J.: "Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my lord has said to-day, that you make it a little more definite by saying, such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is. . . . I think in each case the court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not."

rule was followed in the case of *Murdock v. The Railroad Co.*,³¹ which was an action for a breach of contract to carry, and in *Pullman Car Co. v. Barker*,³² which was an action founded in tort. In the latter case the facts were that a sleeping-car caught fire through the negligence of the carrier's servants, and a female passenger, who was then "unwell," and awakened only in time to escape partly dressed, in passing to another car on a cold night in her stocking feet caught a severe cold which caused a cessation of her monthly sickness and brought on a long siege of illness. It was held that these consequences were too remote to charge the carrier with liability for compensation. So where a railroad train failed to stop and take on the plaintiff, who wished to go to another station upon the road, whereupon, without waiting for another train or hiring a conveyance to carry him there, as he might have done, he undertook to walk the distance and became sick therefrom, it was held that the sickness did not result directly or naturally from the failure of the train to stop and take him on, and that the damage resulting from the sickness thus induced was too remote and could not be allowed.³³ And where a passenger, who had been carried past his station a short distance in the night-time, was misled by the statement of the conductor or brakeman as to the location of the train in reference to the station, and, in endeavoring to reach the highway, fell into a cattle-guard which he saw, but was deceived by his vision as to its distance, it was held that the injury, if not pure accident, was not the proximate result of the wrong of the carrier.³⁴ So where

31. 133 Mass. 15.

32. 4 Colo. 344. Where the passenger is negligently carried beyond his destination and is put off without injury, damages for sickness resulting from having fallen down in the mud and becoming wet and frightened while going from the train to the station are not recoverable. *Rawlings v. The Railroad*, 97 Mo. App. 511, 71 S. W. Rep. 534.

33. *Indianapolis, etc., Ry. Co. v.*

Birney, 71 Ill. 391. To the same effect, *Louisville, etc., R. Co. v. Fleming*, 14 Lea, 128.

34. *Lewis v. The Railway*, 54 Mich. 55. In this case, *Cooley, C. J.*, after distinguishing *Pennsylvania Co. v. Hoagland*, 78 Ind. 203, and *Smith v. Packet Co.*, 86 N. Y. 408, and commenting on *Brown v. Railway Co.*, 54 Wis. 342 (cited in following section), as opposed to *Pullman Car Co. v. Barker, supra*; *Hobbs v. Railway Co., supra*,

the train upon which the plaintiff was a passenger collided in the night-time with a train of flat cars, and in attempting to leave the train by passing over a flat car, several other passengers having alighted safely in that way, the plaintiff caught his toe in a stake-hole of the flat car which caused him to fall forward and injure his arm, it was held that the collision with the train of flat cars was not the proximate cause of the plaintiff's injury, and that no recovery could be had since the injury was not attributable to the fault of anyone, but was one of those accidents for which no one was responsible.³⁵

Sec. 1429. Same subject—The more liberal rule.—But while the decision in the English case of *Hobbs v. The Railway*³⁶ is generally followed, its effect has, in most of the states of this country, been restricted; and it is held that where the breach of the contract to carry, in itself amounts to a tort, the rule announced in the *Hobbs* case does not apply. Where, therefore, the carrier has wrongfully set the passenger down short of his destination or has carried him beyond it, and has thereby imposed upon him the necessity of getting to his destination by other means, the carrier must respond, whether the action be brought for the breach of the contract or for the tort, if the passenger, while in the exercise of reasonable care and prudence for his safety, has received an injury while seeking to extricate himself from the situation in which the carrier has thus wrongfully placed him. Thus, where a man, with his wife and child, who were passengers to M., were told by a brakeman that they had reached that place and to get out, when in fact they were three miles distant, and they were set down in the night-time at a place where they could find no shelter and therefore walked to their destination exposed to the weather which had been rainy,

and *Francis v. Transfer Co.*, 5 Mo. App. 7, says:

"But it is not necessary to express any opinion upon the conflict which these cases disclose, because in the case before us there was an independent cause intervening the fault of the defendant

and the injury the plaintiff sustained, and from which the injury resulted as a direct and immediate consequence."

35. *Vandercook v. The Railroad*, 125 Mich. 459, 84 N. W. Rep. 616.

36. L. R. 10 Q. B. 111.

thereby causing serious illness to the wife, the carrier was held liable.³⁷ So where the carrier neglected to stop at the passenger's destination, and carried her five miles beyond and put her off, saying that she would there find a conveyance back, which was not furnished, and she therefore walked for three hours on a hot, sultry afternoon, crossing streams, climbing fences and pursued and frightened by dogs, all of which brought on a siege of illness, the carrier was held liable.³⁸

So the carrier has been held liable to the passenger for sickness caused by wilful delay;³⁹ by unjustifiable detention and exposure to an unhealthy climate;⁴⁰ for injury to health caused by exposure to the weather after having been wrongfully expelled from the train;⁴¹ for bodily suffering caused by being compelled to walk back to his destination after being negligently carried beyond it;⁴² for sickness and suffering caused by failing to stop at a regular and advertised landing place and thereby leaving passengers exposed all night to the weather;⁴³ for an injury sustained in getting back to the station after having been

37. *Brown v. The Railway*, 54 Wis. 342.

38. *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474 See, also, *Railroad Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. Rep. 1134; *Railway Co. v. Cloes*, 5 Ind. App. 444, 32 N. E. Rep. 588; *Railway Co. v. Williams* (Tex. Civ. App.), 78 S. W. Rep. 5; *Bell v. Railroad Co.*, 76 Miss. 71, 23 So. Rep. 268.

39. *Weed v. The Railroad*, 17 N. Y. 362.

40. *Williams v. Vanderbilt*, 28 N. Y. 217.

As where the train upon which the plaintiff was a passenger was run upon a side track so that certain shovelers riding thereon could shovel snow from the track, the exposure causing the plaintiff to have inflammatory rheumatism. *Rosted v. The Railway*, 76 Minn. 123, 78 N. W. Rep. 971.

41. *Serwe v. The Railroad*, 48 Minn. 78, 50 N. W. Rep. 1021; *Railway Co. v. Klitch*, 11 Ind. App. 290, 37 N. E. Rep. 560.

42. *Mobile, etc., R. Co. v. McArthur*, 43 Miss. 180.

But where the passenger has forfeited his right to ride and is ejected from the train, compensation for suffering caused by exposure, or for sickness consequent to such exposure, is not recoverable. *Railway Co. v. James*, 82 Tex. 306, 18 S. W. Rep. 589, 15 L. R. A. 347.

43. *Heirn v. McCaughan*, 32 Miss. 17.

If the carrier fails to stop its train at a station to permit a passenger to board it, and the passenger uses ordinary care in selecting other means to make the trip, the carrier will be liable for injuries suffered through exposure to the weather while making such

wrongfully ejected;⁴⁴ for illness caused by being compelled, on account of the station being closed during an inclement season of the year, to wait upon the platform for a delayed train;⁴⁵ and for suffering caused by a cold contracted by being obliged to wait for a delayed train in a station which was not heated.⁴⁶

Sec. 1430. (§ 809b.) Same subject—How question determined.—The difficulty in this, as in other cases, lies not so much in the determination of the rule as in the application of it. “Unquestionably,” said Clopton, J., in the case of *Alabama, etc., Railroad Co. v. Arnold*,⁴⁷ “the negligence of the defendant must be the proximate cause of the injury to entitle the plaintiff to recover; that is, that the injury sustained was such as might have been reasonably anticipated in the ordinary and usual course of events. No difficulty arises when the damage directly follows the wrong; when they are so proximately contemporaneous that no time or occasion is afforded for the operation of another instrumentality. It ordinarily arises when there is an intervening cause or several causes contributing to the result. Generally, in such cases, the law will attribute the injury to the last cause when it follows in immediate succession. But the agency nearest in point of time is not regarded in every case as the proximate cause in contemplation of law. The injury will be referred to the nearest and immediate agency only when it is independent of the original act or conduct of the defendant. If the intervening causes are merely incidental, having been set in motion by the first cause, and are not new and independent forces sufficient of themselves to cause the disaster, the law passes these, and traces the injury to the wrongful act which puts them in operation. The principle is that if the injury is produced

trip. *International, etc., R. Co. v. Addison*, — Tex. Civ. App. —, 93 S. W. Rep. 1081.

44. *Evans v. Railway Co.*, 11 Mo. App. 463; *Houston, etc., R. Co. v. Berry* (Tex. Civ. App.), 84 S. W. Rep. 258. See, also, *Malone v. Railroad Co.*, 152 Penn. St. 390, 25 Atl. Rep. 638.

45. *Boothby v. Railway Co.*, 66 N. H. 342, 34 Atl. Rep. 157.

46. *Texas, etc., Ry. Co. v. Mayes* (Tex.), 15 S. W. Rep. 43. See, also, *St. Louis, etc., Ry. Co. v. Ricketts*, 96 Tex. 68, 70 S. W. Rep. 315, reversing (Tex. Civ. App.) 54 S. W. Rep. 1090.

47. 80 Ala. 600.

by the wrongful act during the continuance of its causation, it will be regarded as the proximate cause; but as too remote, though furnishing the occasion, when the injury occurs after the act is completed and terminated by the intervention of another and independent cause. 'On the intervention of other agencies, the inquiry should be, is the original wrongful act an antecedent, efficient and dominant cause which put the other causes in operation?' '48

48. Citing *Cooley on Torts*, 70; *Insurance Co. v. Bonn*, 95 U. S. 117; *Billman v. Railroad Co.*, 76 Ind. 166; *Jordan v. Hyatt*, 4 Gratt. 151; *Ricker v. Freeman*, 56 N. H. 420; *Sheridan v. Railroad Co.*, 36 N. Y. 39; *East Tenn., etc., R. Co. v. Lockhart*, 49 Ala. 315. See, also, *Edgerly v. The Railroad*, 67 N. H. 312, 36 Atl. Rep. 558; *Railway Co. v. Evans*, 52 Neb. 50, 71 N. W. Rep. 1062; *Saxton v. The Railway*, 98 Mo. App. 494, 72 S. W. Rep. 717; *Butts v. The Railroad*, 110 Fed. 329, 49 C. C. A. 69; *International, etc., R. Co. v. Harder* (Tex. Civ. App.), 81 S. W. Rep. 356; *Davis v. The Railroad*, 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654; *Feldschneider v. The Railway*, 122 Wis. 423, 99 N. W. Rep. 1034; *Wood v. The Railroad*, 177 Penn. St. 306, 35 Atl. Rep. 699, 55 Am. St. Rep. 728, 35 L. R. A. 199.

"To show what is understood by intervening cause," said *Cooley*, C. J., in *Lewis v. The Railway*, 54 Mich. 55, which was an action by the passenger to recover damages for an injury received by falling into a cattle-guard, "it may be useful to refer to a few cases. *Livie v. Janson*, 12 East, 648, was a case of insurance on a ship warranted free of American condemnation. In sailing out of New York she was

damaged by perils of the sea, stranded and wrecked on Governor's Island, and then seized and condemned. It was the peril of the sea that caused the vessel to be seized and condemned; but as the condemnation was the proximate cause of the loss, the insurers were held not liable. A similar case is *Delano v. Ins. Co.*, 10 Mass. 354, where a like result was reached.

"In *Tisdale v. Norton*, 8 Met. 388, the facts were that a highway was defective, and the plaintiff, who was using it, went out of it into the adjoining field, where he sustained an injury. He brought suit against the town, whose duty it was to keep the highway in repair. But the court held that only as a remote cause could the injury of the plaintiff be said to be due to the defect in the highway. The proximate, not the remote, cause is that which is referred to in the statute which gives an action against the town; and the proximate cause in this case was outside the highway, not within it.

"In *Anthony v. Slaid*, 11 Met. 290, the plaintiff, who was contractor with a town to support, for a specific time and for a fixed sum, all the town paupers in sickness and in health, brought suit against one who, it was alleged, had assaulted and beaten one of

the paupers, as a consequence of which the plaintiff was put to increased expense for care and support, but the action was held not maintainable.

"In *Silver v. Frazier*, 3 Allen, 382, it was decided that a principal whose agent has disobeyed his instructions, induced to do so by the false representations of a third party, cannot maintain an action against such third party for the damage sustained. Said Bigelow, C. J.: 'The alleged loss or injury suffered by the plaintiff is not the direct and immediate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent, employed by the plaintiff to do a certain piece of work, disobeyed the orders of his principal, and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that his agent violated his duty, and thereby did him an injury, and seeks to recover damages therefor by an action against a third person on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without a precedent. The immediate cause of injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff.'

"In *Dubuque Wood and Coal Ass'n v. Dubuque*, 30 Iowa, 176, the facts were that the plaintiff had a quantity of wood deposited at one end of a bridge, which was

to be taken over the bridge into the city of Dubuque. The bridge was out of repair, and while awaiting repair by the city, whose duty it was, the wood was carried away by a flood. The plaintiff sued the city for the value of his wood, but it was held he could not recover. Beck, J., in deciding the case, illustrates the principle as follows: 'An owner of lumber deposited upon the levee of the city of Dubuque exposed to the floods of the river starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein, falls, and his horses are killed. By the breaking of the bridge and the loss of his team he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally caused its loss. Damage on account of the first is recoverable, but for the second is denied.'

"Similar to this are *Daniels v. Ballantine*, 23 Ohio St. 532; *s. c.* 13 Am. Rep. 264, and *McClary v. Sioux City, etc., R. R. Co.*, 3 Neb. 44; *s. c.* 19 Am. Rep. 631. In each of these cases the negligence of the defendant left the property of the plaintiff where, by an act of God—in one case a flood and in the other a tornado—it was lost or injured, and in each the act of God, and not the negligence, was held to be the proximate cause of injury.

"In *Scheffer v. Railroad Co.*, 105 U. S. 249, it appeared that, by a

collision of railroad trains, a passenger was injured, and becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. Action was brought against the railroad company as the negligent cause of his death. *Miller, J.*, speaking for the court, and referring to *Insurance Co. v. Tweed*, 7 Wall. 44, and *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469, said: 'The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule in both these cases, a new cause, and a sufficient cause, of death. The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad.'

'In *Bosch v. Burlington, etc., R. R. Co.*, 44 Iowa, 402, the plaintiff's house took fire, and the fire department, because, as was alleged, of the wrongful occupation and expansion of the river bank, were unable to get to the river to obtain water for putting out the fire. Plaintiff sued the defendant for the loss of his property, but the court said the acts of defendant complained of 'have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery.'

'In this last case, *Metallic Compression Co. v. Railroad Co.*, 109 Mass. 277; s. c. 12 Am. Rep. 689, was referred to and distinguished.

The facts there were that the plaintiff's building was on fire, and water was being thrown upon it through hose, when an engine of the defendant was recklessly run upon the hose and severed it, thereby defeating the efforts to extinguish the fire, which otherwise were likely to succeed. In that case the relation of the plaintiff's injury to the defendant's act was direct and immediate. So it was, also, in *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; *Lane v. Atlantic Works*, 111 Mass. 136; and *Rickes v. Freeman*, 50 N. H. 420,—all of which are ruled by the *Squib Case* (*Scott v. Shepherd*, 2 W. Bl. 892); and so, perhaps, are *Fairbanks v. Kerr*, 70 Penn. St. 90; s. c. 10 Am. Rep. 664; and *Lake v. Milliken*, 62 Me. 240; s. c. 16 Am. Rep. 456.

'In *Henry v. St. Louis, etc., R. R. Co.*, 76 Mo. 288; s. c. 43 Am. Rep. 760, it appeared that the plaintiff was wrongfully commanded to get off a caboose of the defendant, where he had a right to be. He obeyed the command, and while upon the ground stepped upon a track, where he was run upon and injured by a train. *Hough, J.*, speaking for the court, said: 'It is, perhaps, probable that if the plaintiff had not been ordered out of the caboose he would not have been injured; but this hypothesis does not establish the legal relation of cause and effect between the expulsion and the injury. If the plaintiff had not left home he certainly would not have been injured as he was, but his leaving home could not therefore be declared to be the cause of his injury. As the plaintiff's injury was neither the ordinary, natural

nor probable consequence of his expulsion from the caboose, such expulsion, however it might excite our indignation in the absence of any regulation of the defendant to justify it, cannot be considered in this action; and the legal aspect of the case is precisely the same as it would have been if no such expulsion had taken place. It is to be regarded as if the plaintiff had gone to the caboose and could not get in because it was locked, or, being able to get in, chose to remain outside.'

'Further reference to authorities is needless. The application of the rule that the proximate, not the remote, cause is to be regarded is obscure and difficult in many cases, but not in this. By the wrong of the defendant the plaintiff was carried past the station where he had a right to be left, and beyond where he had a right, from the information he received from defendant's servants, to suppose he was when he left the car. For any injury or inconvenience naturally resulting from the wrong, and traceable to it as the proximate cause, the defendant may be held responsible. But before any injury had been sustained, the plaintiff discovered where he was, and started back for the road which he intended to take. Whatever danger there was to be encountered in the way was to be found in the cattle-guard, and this he understood and calculated upon. Evidently it did not appear to him of a formidable nature; for, on the supposition that he was north of the highway when he left the train, he had voluntarily started south with the expectation of crossing the cattle-guard on that

side, over which he might or might not find a plank laid, when by stepping back a few rods, where he supposed the station-house to be, he might pass from thence out to the highway by the passageway for persons and vehicles leading from the station-house to it, and thereby avoid the cattle-guard altogether. It is very clear that he did not anticipate danger; neither, probably, would any other person have anticipated it. The crossing was a simple matter; it was only to ascertain, first, whether a plank or timber was laid across, and if so to cross upon it, and if not to step down into the excavation and out on the other side. Where was he to look for danger? The night was dark, it is true; but even by the sense of feeling, when he knew he was within a few feet of the cattle-guard, one would expect him to be able to determine its exact location. But then something happened which it is evident that the plaintiff, with full knowledge of all the facts, did not at all expect and had not feared. Misled apparently by visual deception, he moved forward under a supposition that the cattle-guard, upon the brink of which he already stood, was some paces off, and this deception, with the slipping of his foot, concurred to produce the injury.

'What was this but accident? It was an event which happened unexpectedly and without fault. The defendant or its agents had not produced the deception or caused the foot to slip, and such wrong as the defendant had been guilty of was in no manner connected or related to the injury except as it was the occasion for bringing the plaintiff where the accident

In the case of *Snow v. The Railroad*,¹ it appeared that a female passenger was injured in a collision of cars, and, in consequence, frequently suffered from attacks of dizziness. Several months after the injury, while standing in a sink examining a leak in a water pipe, she had an attack of dizziness which caused her to fall to the floor and break her wrist. It was held that the negligence of the carrier was not the proximate cause of the injury to her wrist. And where a passenger was injured through a derailment of the carrier's vehicle, and some months thereafter died, the immediate cause of his death being an abscess on

occurred. It was after the plaintiff had been brought there that the cause of injury unexpectedly arose. If lightning had chanced to strike the plaintiff at that place, the fault of the defendant and its relation to the injury would have been the same as now, and the injury could have been charged to the defendant with precisely the same reason as now. If the accidental discharge of a gun in the hands of some third person had wounded the plaintiff as he approached the cattle-guard, the connection of defendant's wrong with the injury would have been precisely the same which appears here. But the proximate cause of injury in the one case would have been the act of God, in the other inevitable accident, but not more plainly accident than was the proximate cause here. Back of that cause in this case were many others, all conducing to bring the plaintiff to the place of the danger and the injury; the act of the defendant was the last of a long consequence; but as between the causes which precede the proximate cause, the law cannot select one rather than any other as that to which the final consequence

shall be attributed, and it stops at the proximate cause, because to go back of it would be to enter upon an investigation which would be both endless and useless.

"The injury being the result of pure accident, the party upon whom it has chanced to fall is necessarily left to bear it. No compensation can be given by law in such cases. *Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 1 Ld. Raym. 38; *Losee v. Buchanan*, 51 N. Y. 476; s. c. 10 Am. Rep. 623; *Vincent v. Stinehouse*, 7 Vt. 62; s. c. 29 Am. Dec. 145; *Morris v. Platt*, 32 Conn. 75; *Brown v. Collins*, 53 N. H. 442; s. c. 16 Am. Rep. 372; *Bizzell v. Booker*, 16 Ark. 308; *Marshall v. Welwood*, 38 N. J. Law, 339; s. c. 20 Am. Rep. 394; *Paxton v. Boyer*, 67 Ill. 132; s. c. 16 Am. Rep. 615; *American Express Co. v. Smith*, 33 Ohio St. 511; s. c. 31 Am. Rep. 561; *Plummer v. State*, 4 Tex. App. 310; s. c. 30 Am. Rep. 165; *Parrot v. Wells*, 15 Wall. 524; *Holmes v. Mather*, L. R. 10 Exch. 261. A case like this appeals strongly to the sympathies, but sympathy cannot rule the decision."

1. 185 Mass. 321, 70 N. E. Rep. 205.

the liver, it was held to be incumbent on the plaintiff to show with reasonable certainty that the abscess was caused by the injury which had been received.²

But it is not necessary, in order to charge the carrier with liability, that he should have anticipated the very occurrence which resulted from his wrongful act. It will be sufficient if, after the injury has happened, it is seen to have followed from his misconduct in the usual and natural course of events and within the range of reasonable probability.³

Sec. 1431. Passenger must seek to make his damage as light as possible.—But where the passenger has sustained an injury at the hands of the carrier, it is his duty to endeavor to make his damage as light as possible; and for those consequences of the carrier's wrongful act which the passenger in the exercise of reasonable care and prudence could have avoided, the carrier will not be liable.⁴ This rule was applied where a passenger, who had been injured, continued his journey without first securing the aid of a competent physician or surgeon in consequence of which his injury was aggravated;⁵ where a passenger, being denied passage in a chair-car, left the train altogether and sought damages for the delay when he might have gone on in

2. *McCafferty v. The Railroad*, 193 Penn. St. 339, 44 Atl. Rep. 435, 74 Am. St. Rep. 690.

3. *McCann v. The Railway*, 58 N. J. Law, 642, 34 Atl. Rep. 1052, 33 L. R. A. 127; *Keegan v. The Railroad*, 76 Minn. 90, 78 N. W. Rep. 965.

4. But this rule does not mean that the court may charge the jury that it was the passenger's duty to do some particular thing, such as to have an operation performed, or other surgical treatment. *Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. Rep. 979.

5. *Railway Co. v. White*, 101 Fed. 928, 42 C. C. A. 86; s. c. 108 Fed. 990.

to say that the person injured was bound at his peril to secure the services of the most skilful physician in the community, or to adopt a course of treatment which in the end would prove most efficacious. The exercise of reasonable and ordinary care and prudence, according to the circumstances, is all the law demands. *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. Rep. 278, citing *Sellick v. City of Janesville*, 100 Wis. 157, 75 N. W. Rep. 975, 41 L. R. A. 563; *Railway Co. v. Zantlinger*, 93 Tex. 64, 53 S. W. Rep. 379, 44 L. R. A. 553. See, also, *Texas, etc. Ry. Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. Rep. 237.

But the carrier cannot be heard ,

another car;⁶ where a passenger in a sleeping-car refused to continue his journey in a day-coach, the sleeping-car having been turned back by the carrier's orders just before the passenger's destination was reached;⁷ where a passenger, after having been wrongfully ejected, refused to accept the conductor's invitation to resume his journey, and then claimed damages for the delay;⁸ where a woman carried past her station refused assistance in getting back and walked a longer distance than was necessary, and then sought damages for the trouble and inconvenience so incurred;⁹ where a woman who had likewise been carried beyond her destination walked back on a very cold night and thereby suffered injury, when shelter and accommodation could have been had until morning;¹⁰ where a passenger, who was refused transportation, made no effort to secure other means to proceed on his journey, but needlessly remained at an intermediate station, and then sought to recover damages for the delay;¹¹ where a passenger, being wrongfully left behind when one ship sailed, was offered passage on the next, but refused it, to stay and sue the carrier for the breach of contract, and in the action sought to recover damages for the delay after the sailing of the second ship;¹² where a female passenger by steamboat, rather than pay the charge demanded for a berth to which she

6. *Wright v. The Railroad*, 78 Cal. 360.

7. *Railway Co. v. Groesbeck* (Tex. Civ. App.), 24 S. W. Rep. 702.

8. *Railroad Co. v. Hine*, 121 Ala. 234, 25 So. Rep. 857.

9. *Gulf, etc., Ry. Co. v. Head* (Tex.), 15 S. W. Rep. 504.

10. *Texas, etc., Ry. Co. v. Cole*, 66 Tex. 562. To like effect are *Louisville, etc., R. Co. v. Fleming*, 14 Lea, 128; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 392; *Francis v. Transfer Co.*, 5 Mo. App. 7; *Haggerty v. Railroad Co.*, 59 Mich. 366; *Childs v. Railway*, 28 N. Y. Supp. 894, 77 Hun, 539; *Bader v.*

The Railway, 52 La. Ann. 1060, 27 So. Rep. 584; *Cain v. The Railroad*, — Ky. Law Rep. —, 84 S. W. Rep. 583; *Spry v. The Railway*, 73 Mo. App. 203; *Railway Co. v. Turner* (Tex. Civ. App.), 23 S. W. Rep. 83.

As to the aggravation of injuries to pregnant women, see *Georgia R. Co. v. Usry*, 82 Ga. 54; *Missouri, etc., Ry. Co. v. Watson*, 72 Tex. 631.

11. *Turner v. The Railway*, 15 Wash. 213, 46 Pac. Rep. 243, 55 Am. St. Rep. 883.

12. *Ansett v. Marshall*, 22 L. J. Q. B. 118.

claimed she was entitled under her ticket, slept on a couch in the cabin and in consequence of the exposure contracted an illness for which she sought to hold the carrier responsible, when by paying the small sum demanded she could have secured suitable accommodation;¹³ where a passenger, having given his ticket to the baggage-master by whom the ticket was lost, boarded the train without first securing another ticket, and then sought to recover damages for being ejected from the train.¹⁴

Sec. 1432. Effect of previous sickness or disease.—If the passenger, at the time an injury is received through the negligence of the carrier, is suffering from some disease or illness which tends to aggravate the injury, the passenger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity; and the fact that the carrier was not informed of the passenger's condition will make no difference.¹⁵ Where a female passenger fell and was injured through the carrier's negligence while alighting from a passenger car, it was held that the fact that she wore an artificial limb which greatly aggravated the injury would not relieve the carrier from making full compensation for the real injury suffered.¹⁶ So where a female passenger who was pregnant was injured in a collision of cars, it was held that the carrier was liable for the injury notwithstanding the fact that had she not been pregnant she would not have been injured.¹⁷ And although a disease was the immediate cause of the

13. *McWethy v. The Railroad*, 127 Mich. 333, 86 N. W. Rep. 827, 55 L. R. A. 306. See, also, *Clarry v. The Railway (Canada)*, 29 Ont. R. 18.

14. *Galveston, etc., R. Co. v. Scott*, — Tex. Civ. App. —, 79 S. W. Rep. 642.

15. *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; *Spade v. Railroad Co.*, 172 Mass. 488, 52 N. E. Rep. 747, 43 L. R. A. 832; *Missouri, etc., Ry. Co. v. Byrd* (Tex. Civ. App.), 89 S. W. Rep. 991; *St. Louis, etc.,*

Ry. Co. v. Ferguson, 26 Tex. Civ. App. 460, 64 S. W. Rep. 797; *Mathew v. Railroad Co.*, 115 Mo. App. 468, 78 S. W. Rep. 271.

The fact that the injuries would not have happened to a younger person or one of less weight does not absolve the carrier. *Staines v. Railroad Co.*, — N. J. L. —, 61 Atl. Rep. 385.

16. *Kral v. Railway Co.*, 71 Minn. 422, 74 N. W. Rep. 166.

17. *St. Louis, etc., Ry. Co. v. Ferguson*, *supra*.

death of one who was injured by the carrier's negligence while traveling as a passenger, it was held that if his death was accelerated or hastened by the injury, the carrier would be liable.¹⁸ And where a disease, caused by the injury, supervenes, or where the disease exists at the time of the injury and is aggravated by it, the carrier's negligence will still be considered the proximate cause of the increased pain or suffering to which the passenger is thereby subjected, and he will be entitled to full compensatory damages.¹⁹ Thus where a female passenger was wrongfully ejected from a passenger train, and by reason of the consequent humiliation there resulted a recurrence of nervous troubles from which she had suffered in the past, it was held that the disorders for which she sought to recover damages were physical results of the negligence complained of, and constituted a proper element of damage.²⁰

Sec. 1433. (§ 810.) Damages in case of maltreatment—Ejection from train.—In actions for the maltreatment of the passenger, as, for instance, in his wrongful expulsion from the carrier's conveyance, by the carrier himself or by his servants, although the circumstances may be such as would ordinarily restrict the damages to such as are merely compensatory, the manner in which the wrongful act is performed may be taken into consideration, and any indignity, insult or unnecessary force or rudeness in the conduct of the carrier or his employees, towards the passenger, may be considered as an aggravation of the injury, and as a reason for enhancing the amount of the damages.²¹ So

18. *Meekins v. Railroad Co.*, 134 N. Car. 217, 46 S. E. Rep. 493. *Shore, etc., Ry. Co. v. Rosenzweig*, 113 Penn. St. 519; *Houston, etc.,*

19. *Louisville, etc., Ry. Co. v. Snyder*, 117 Ind. 435, citing *Ohio, Ry. Co. v. Leslie*, 57 Tex. 83. See, also, *Pecos, etc., Ry. v. Williams* (Tex. Civ. App.), 78 S. W. Rep. 5; *443; Louisville, etc., Ry. Co. v. Railway Co. v. Brown*, 16 Tex. Civ. Wood, 113 Ind. 544; *Indianapolis, App. 93, 40 S. W. Rep. 608.*

etc., *Ry. Co. v. Pitzer*, 109 Ind. 179; *Terre Haute, etc., R. Co. v. 20. Sloane v. The Railway*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. Buck, 96 Ind. 346; *Ehrgott v. Meyer*, 96 N. Y. 246; *Jucker v. Railway* R. A. 193.

Co., 52 Wis. 150; *Denver, etc., Ry. 21. Chicago, etc., R. R. v. Flagg*, 43 Ill. 364; *Coppin v. Braithwaite*, Co. v. Harris, 122 U. S. 597; *Lake 8 Jurist, 875; Lucas v. The Rail-*

the fact that the wrongful act was done with rudeness, in the presence of other passengers, under circumstances calculated to cause feelings of shame and humiliation on the part of the passenger, may also be taken into the account; and in such cases the passenger will be entitled to recover more than nominal damages, though he may have suffered no pecuniary loss.²² And the same rule has been held to apply where the passenger was wrongfully refused admittance into the carrier's conveyance under circumstances calculated to subject him to humiliation and

road, 98 Mich. 1, 56 N. W. Rep. 1039, 39 Am. St. Rep. 517; *Railway Co. v. O'Conner*, 76 Md. 207, 24 Atl. Rep. 449, 35 Am. St. Rep. 422, 16 L. R. A. 449; *Railway Co. v. Hoerr*, 120 Ill. App. 65; *So. Ry. Co. v. Cassell*, — Ky. —, 92 S. W. Rep. 281.

22. *Chicago, etc., Railway v. Chisholm*, 79 Ill. 584; *Toledo, etc., Railway v. McDonough*, 53 Ind. 289; *Smith v. The Railway Co.*, 23 Ohio St. 10; *Sloane v. The Railway*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193; *Coine v. The Railway*, 123 Iowa, 458, 99 N. W. Rep. 134; *Marx v. The Railroad*, 111 La. 1085, 36 So. Rep. 862; *Railroad Co. v. Jackson*, 25 Ky. Law Rep. 2087, 79 S. W. Rep. 1187; *Railroad Co. v. Wilkinson*, 15 Ky. Law Rep. 92; *Railroad Co. v. Stephen*, 13 Ky. Law Rep. 687; *Railroad Co. v. Arnold*, 8 Ind. App. 297, 34 N. E. Rep. 742; *Railroad Co. v. Conley*, 6 Ind. App. 9, 32 N. E. Rep. 96; *Houston, etc., R. Co. v. McNeel* (Tex. Civ. App.), 76 S. W. Rep. 206; *Railroad Co. v. Adams*, 60 Ill. App. 571; *Levy v. Steamship Co.*, 123 Fed. 347; *Pennsylvania Co. v. Scofield*, 121 Fed. 814, 58 C. C. A. 176; *Zion v. Southern Pacific Co.*, 67 Fed. 500; *Johnson v. The Railway*, 46 Fed. 347;

Willson v. The Railroad, 5 Wash. 621, 32 Pac. Rep. 468; *Cherry v. The Railroad*, 61 Mo. App. 303; *s. c.* 52 Mo. App. 499; *So. Pac. Co. v. Bailey* (Tex. Civ. App.), 91 S. W. Rep. 820; *Missouri, etc., Ry. Co. v. Welch* (Tex. Civ. App.), 91 S. W. Rep. 621.

But where the conductor acts in good faith and in a gentlemanly manner, and the passenger quietly leaves the train when requested to do so, damages for suffering of mind cannot be recovered. *McLean v. The Railway*, 50 Minn. 485, 52 N. W. Rep. 966. So injury to a person's good name is not a proper element of damage. *Procter v. The Railway*, 130 Cal. 20, 62 Pac. Rep. 306. And it has been held that if the conductor mistakenly enforces a valid rule, and without malice or wantonness applies it to an individual where the rule is not applicable, honestly supposing that he is in the discharge of his duty, there is no ground for allowing damages compensatory of indignity and insult. *Railroad Co. v. Hogue*, 50 Kan. 40, 31 Pac. Rep. 698.

Where a passenger is wrongfully expelled from a passenger train, he is entitled to recover the actual damages that he has sustained

shame.²³ And although the wrongful act to which the passenger has been subjected was not done in the presence of other passengers, he may nevertheless recover damages for the humiliation and disgrace which one in his condition in life would suffer in consequence. Thus where an ex-attorney general of the state was wrongfully ejected from one of the carrier's trains, it was held that to have the news go out that he had been ejected from a railway train would certainly tend to humiliate and disgrace him, and that damages could be recovered therefor.²⁴ So although lawful occasion may exist for the passenger's expulsion, yet, if unnecessary force be used, or if he be recklessly exposed to danger, or if rudeness, insult or indignity be inflicted, he may recover damages for these injuries.²⁵

Sec. 1434. Same subject—How when maltreatment is provoked by insulting language or violent conduct of passenger.—It has been seen that abusive or insulting language used by the

therefrom; and if the expulsion is attended with undue force or other aggravating circumstances, calculated to humiliate the passenger or wound his pride; or if the passenger be lawfully ejected, but undue force is used, accompanied by fraud or an exhibition of malice, rudeness, recklessness or other wilful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts. *Rose v. Railroad Co.*, 106 N. C. 168, citing *Hicks v. Railroad Co.*, 68 Mo. 329; *Railroad Co. v. Ballard*, 85 Ky. 307; *Forsee v. Railroad Co.*, 63 Miss. 66; *Railroad Co. v. Rice*, 38 Kans. 398; *Railroad Co. v. Arms*, 91 U. S. 489; *Railroad Co. v. Hoefflich*, 62 Md. 300; *Clark v. Railroad Co.*, 91 N. C. 512.

See to like effect, *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439; *Delaware, etc., R. Co. v. Walsh*, 47 N. J. L. 548; *Ran-*

dolph v. Railroad Co., 18 Mo. App. 609; *Allen v. Ferry Co.*, 46 N. J. L. 198.

23. *Railway Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. Rep. 169, 87 Am. St. Rep. 245.

24. *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. Rep. 820, 97 Am. St. Rep. 376, 61 L. R. A. 122. See, also, *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. Rep. 1112, 33 Am. St. Rep. 157.

25. *Knowles v. Railroad Co.*, 102 N. C. 59; *Steamboat Co. v. Brockett*, 121 U. S. 637; *Jardine v. Cornell*, 50 N. J. L. 485; *Brown v. Railroad Co.*, 66 Mo. 588; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155; *State v. Kinney*, 34 Minn. 311; *Mykleby v. Railway Co.*, 39 Minn. 54; *Thomas v. Black*, 8 Del. 507, 18 Atl. Rep. 771; *Railway Co. v. James*, 82 Tex. 306, 18 S. W. Rep. 589, 15 L. R. A. 347.

But where the conductor has a legal right to eject the passenger,

passenger toward a servant of the carrier will never justify the latter in assaulting the passenger.²⁶ It has also been seen that, while a servant of the carrier will be justified in using force to repel an attack upon his person by the passenger, he will not be justified in using more force than is necessary for his defense and protection.²⁷ But although the law will never justify an unwarranted assault by a servant upon the passenger, it does, it is said, recognize the weakness and infirmities of human nature which subject it to uncontrollable influences when under great or maddening excitement superinduced by insults or threats.²⁸ If, therefore, the assault upon the passenger has been provoked by insulting remarks or violent conduct which would naturally arouse the anger and passions of men of ordinary temperaments, the carrier, in an action against him, may offer proof of the passenger's language or conduct in mitigation of damages. While it is held by some courts that proof of the passenger's provoking language or conduct may be offered by the carrier in mitigation of exemplary damages only,²⁹ it is held by others that such proof may be offered in mitigation of compensatory as well as of exemplary damages.³⁰

Sec. 1435. (§ 811.) Exemplary or punitive damages against carriers.—The law does not, however, always limit the amount of damages which may be recovered by the injured passenger by the rule of compensation. There are many cases in which carriers of passengers, in common with other tort-feasors, under circumstances evincing malicious motives in the perpetration of the wrongful act, or of reckless misconduct in the at-

and does so without unnecessary force or violence, damages cannot be recovered because in telling the passenger to get off he spoke in a brusque and decided manner. *Rose v. The Railroad*, 106 N. Car. 168. To same effect, see *Railway Co. v. Bennett*, 50 Fed. 496, 1 C. C. A. 544, 6 U. S. App. 95.

26. *Ante*, § 1102.

27. *Ante*, § 1102.

28. *Railroad Co. v. Barger*, 80

Md. 23, 30 Atl. Rep. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220.

29. *Railway Co. v. De Pascale*, 70 Ohio St. 179, 71 N. E. Rep. 633.

30. *Robinson v. Rupert*, 23 Penn. St. 523; *Tyson v. Booth*, 100 Mass. 258; *Railway Co. v. Barger*, *supra*; *Daniel v. Giles* (Tenn.), 66 S. W. Rep. 1128; *Ward v. White* (Va.), 9 S. E. Rep. 1021; *Kiff v. Youmans*, 86 N. Y. 330; *Thrall v. Knapp*, 17 Iowa, 469; *Houston*,

tempt to perform the assumed duty, will be held liable to exemplary damages. Such cases may be divided into two classes, the one being cases in which the damages claimed are attributable to the negligence of the carrier, and the other, cases in which they arise from the personal maltreatment of the passenger.

Sec. 1436. (§ 812.) On what theory allowed.—It must be considered as now thoroughly settled by the authorities in this country, that the carrier becomes liable to exemplary damages in cases of injury to the passenger by his negligence, only when his conduct has been such as shows him to have been so entirely wanting in that care and diligence which the law rigorously exacts, as to be justly chargeable with wanton or reckless indifference to the passenger's safety. Whenever this is the case, the law allows another element to enter into the computation of the amount of the damages, not because the plaintiff is entitled to anything more than strict compensation, but for the sake of the salutary effect which such examples may have in deterring the carrier as well as others from the perpetration of similar wrongs.¹ Thus—

Sec. 1437. (§ 812a.) When allowed for carrier's neglect of duty in furnishing safe vehicles, tracks, etc.—Where the carrier's own neglect of duty, as in furnishing safe tracks, vehicles, stational facilities and the like, is so gross as to amount to a reckless disregard of the safety of his passengers, exemplary damages may properly be awarded, and the pecuniary ability of the carrier to perform his duty is a matter of no consequence,

etc., *R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. Rep. 981. *phis, etc., R. R. v. Green*, 52 Miss. 779; *New Orleans, etc., R. R. v.*

1. *Milwaukee, etc., Railway v. Arms*, 91 U. S. 489; *Missouri, etc., Ry. Co. v. Humes*, 115 U. S. 512, 521; *Minneapolis, etc., Ry. Co. v. Beckwith*, 129 U. S. 26, 36; *Caldwell v. The Steamboat Co.*, 47 N. Y. 282; *Millard v. Brown*, 35 N. Y. 297; *Louisville, etc., R. R. v. Smith*, 2 Duvall, 556; *Bannon v. The Railroad*, 24 Md. 108; *Mem-*

Statham, 42 *id.* 607; *Williamson v. The Stage Co.*, 24 Iowa, 171; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Ky. Cen. R. R. v. Dills*, 4 Bush, 593; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Millard v. Brown*, 35 N. Y. 297; *Railroad Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. Rep. 499.

because if he is not able to perform his duty he should not accept the passenger for carriage.²

Sec. 1438. When exemplary damages allowed for reckless acts of carrier's servants.—But to justify an award of exemplary or punitive damages, the action, it is said, must be against the wrongdoer, and not against a person who, on account of his relation to the offender, is only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.³ And it is accordingly held that, unless there is proof sufficient to implicate the carrier and make him a party to the wrongful act of his servant, exemplary damages, in an action against him, cannot be allowed.⁴ Where, therefore, the proof does not implicate the carrier and, however reckless or criminal the act of the servant may have been, the carrier neither expressly nor impliedly authorizes or ratifies the act, he will be liable for only such damages as will compensate the passenger for the injury sustained.⁵ And this rule is applied whether the carrier be a corporation, firm or private individual.⁶

Sec. 1439. (§ 814.) Same subject.—If, however, the carrier has authorized the reckless act of the servant or employe, or has ratified or approved his misconduct, or has employed or retained in his employment the servant or employe with knowledge of his

2. *Texas, etc., Ry. Co. v. Johnson*, 75 Tex. 158, 12 S. W. Rep. 482.

3. *Keene v. Lizardi*, 8 Louisiana, 26, 33.

4. *Hagan v. Providence & Worcester Railroad*, 3 R. I. 88, 91.

5. *Ackerson v. The Railway*, 32 N. J. (3 Vroom) 254; *Hill v. The Railroad*, 11 La. Ann. 292; *Wardrobe v. Stage Co.*, 7 Cal. 118; *Mendesohn v. The Anaheim Lighter Co.*, 40 Cal. 657; *Warner v. The Railroad*, 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. Rep. 327; *Turner v. The Railroad*, 34 Cal. 594; *Grund v. Van Vleck*, 69 Ill. 478; *McKeon v. The Railway*, 42

Mo. 79; *Quigley v. The Railroad*, 11 Nev. 350; *Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388; *Downey v. The Railroad*, 28 W. Va. 732; *Ricketts v. The Railroad*, 33 W. Va. 433; *Gulf, etc., Ry. Co. v. McFadden* (Tex. Civ. App.), 25 S. W. Rep. 451; *Railway Co. v. Reed*, 80 Tex. 362, 15 S. W. Rep. 1105; *The Amiable Nancy*, 3 Wheaton, 546; *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. R. 261, 37 L. Ed. 97.

6. *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Philadelphia, etc., R. Co. v. Quigley*, 21 How. 202.

unfitness or incompetency, he may be held responsible not only for compensatory but for exemplary damages. In a case before the court of appeals of New York,⁷ in which the attempt was made to hold the company liable for exemplary damages, upon the ground that the derangement of a switch, which had occasioned the accident, was attributable to the drunkenness of the switchman, whose intemperate habits were known to the agent of the company who had authority to hire or discharge the men there employed as switch-tenders, the rule upon the subject was thus stated by Church, C. J.: "For injuries by the negligence of a servant, while engaged in the business of the master within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified."⁸

Sec. 1440. (§ 814a.) Same subject—The more liberal rule.
—But in other cases a more liberal rule is followed, and it is held

7. *Cleghorn v. The Railroad*, 56 (Iowa), 555; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347.

8. See *Frink v. Coe*, 4 *Greene*

that where the negligence of the servant is so gross as to amount to recklessness or to exhibit a conscious indifference to the passenger's safety, exemplary damages may properly be allowed against the carrier, although he has neither authorized nor ratified the servant's negligent conduct.⁹ But in order that this rule may be applicable, something more than mere negligence must be shown. It must be gross, and must "amount to that *entire want of care* which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it."¹⁰

Sec. 1441. (§ 815.) When allowed for active maltreatment of passenger.—The other class of cases in which exemplary damages have been allowed in actions against the carrier consists of cases in which the injury to the passenger has been caused by the wilful, malicious or oppressive treatment which he has received at the hands of the carrier. In such cases there can be no question of the carrier's liability for exemplary or vindictive damages for the tort, if he has himself committed the act, or if he has directed, authorized or ratified it. But in the absence of evidence to show that the maltreatment of the passenger

9. *Railroad Co. v. Kingman*, 18 Ky. Law Rep. 82, 35 S. W. Rep. 264; *Memphis, etc., Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. Rep. 743; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Reeves v. The Railway*, 68 S. Car. 89, 46 S. E. Rep. 543; *Gillman v. The Railroad*, 53 S. Car. 210, 31 S. E. Rep. 224; *Quinn v. The Railway*, 29 S. Car. 381; *Hart v. The Railroad*, 33 S. Car. 427, 12 S. E. Rep. 9; *Railroad Co. v. White*, 82 Miss. 120, 33 So. Rep. 970; *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395; *New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660; *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156; *Rose v. The Railroad*, 106 N. Car. 168; *Holmes v. The Railroad*, 94 N. Car. 318; *Knowles v. The Railroad*, 102 N. Car. 66; *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 So. Rep. 495; *Alabama, etc., R. Co. v. Hill*, 90 Ala. 71, 8 So. Rep. 90; *Hopkins v. The Railroad Co.*, 36 N. H. 9; *Atlantic, etc., Ry. Co. v. Dunn*, 19 Ohio St. 162.

10. *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165; *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. Rep. 853; *International, etc., R. Co. v. Brazzill*, 78 Tex. 314, 14 S. W. Rep. 609; *Hamilton v. Morgan's Co.*, 42 La. Ann. 824, *Patterson v. Railroad Co. (Ala.)*, 7 S. Rep. —; *South, etc., R. Co. v. McLendon*, 63 Ala. 266; *Forsee v. Railroad Co.*, 63 Miss. 67; *Wall*

by a servant or employe was authorized or approved, the carrier can, according to many cases, be held liable only for compensatory damages;¹¹ and to justify a recovery even to that ex-

v. Cameron, 6 Colo. 275; *Gillman v. The Railroad*, 53 S. Car. 210, 31 S. E. Rep. 224.

11. *Lake Shore, etc., Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Warner v. The Railroad*, 113 Cal. 105, 45 Pac. Rep. 187, 54 Am. St. Rep. 327; *Trabing v. The Navigation Co.*, 121 Cal. 137, 53 Pac. Rep. 644; *The Great Western Railway Co. v. Miller*, 19 Mich. 305; *Quigley v. The Railroad*, 11 Nev. 350; *Doran v. The Ferry Co.*, 19 N. Y. Supp. 172; *Sherley v. Billings*, 8 Bush. 147; *Sullivan v. The Railroad*, 12 Or. 392; *Mace v. Reed*, 89 Wis. 440, 62 N. W. Rep. 186; *Craker v. The Railway*, 36 Wis. 657; *Bass v. The Railway*, 39 Wis. 636, 42 *id.* 654; *Downey v. The Railway*, 28 W. Va. 732. See, also, *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489; *Louisville, etc., R. Co. v. Whitman*, 79 Ala. 328; *Chicago, etc., R. Co. v. Bryan*, 90 Ill. 126; *Caldwell v. Steamboat Co.*, 47 N. Y. 282; *Railway Co. v. Rosenzweig*, 113 Penn. St. 514; *Fell v. The Railroad*, 42 Fed. 248.

The supreme court of Wisconsin, when the question came before it as to the liability of a railroad company to punitive damages for a malicious assault of a brakeman upon a passenger, were inclined to hold the company so liable without evidence of its subsequent approval or ratification of the act. *Bass v. The Railway*, 36 Wis. 450. But in a subsequent case, in which the question arose of damages for the maltreatment of the passenger

by a servant of the carrier, the rule suggested in the last case was qualified, and it was held in accordance with the case of *Milwaukee, etc., R. R. v. Finney*, 10 Wis. 388, that the carrier could not be held liable for more than compensatory damages without proof that it expressly authorized or confirmed the malicious act. *Craker v. The Railway*, 36 Wis. 657. And the rule as thus stated is said by the court to be undoubtedly correct and the safer and better rule. *Bass v. The Railway*, 42 Wis. 654.

In *Craker v. The Railway* it was said by Ryan, C. J.: "We think that, in justice, there ought to be a difference in the rule of damages against principals for torts actually committed by agents in cases where the principal is and in cases where the principal is not a party to the malice of the agent. In the former class of cases the damages go upon the malice of the principal—malice common to principal and agent. In the latter class of cases the recovery is for the act of the principal through the agent, in malice of the agent not shared by the principal; the principal being responsible for the act, but not for the motive of the agent. In the former class the malice of the principal is actual; in the latter it must be at most constructive. And we are inclined to think that the justice of the rule accords with public policy. Responsibility for compensatory damages will be a sufficient admonition to carrier corporations to

tent, it must appear that the act of the servant or employe was done by him in the service of his employer, and in the performance of duties within the scope of his employment and authority, and was not the wilful and malicious trespass of the servant, having no reference to the performance of his duties in the business of his employer.¹²

Sec. 1442. (§ 815a.) Same subject—The more liberal rule.—But here too the courts in many of the states have laid down a more liberal rule, and it is held that the carrier is liable in exemplary damages for the wilful, malicious, oppressive, insulting or fraudulent act of his servant, although he has neither previously authorized nor subsequently ratified it, if the act was committed by the servant in the course of his employment and while acting within the scope of his authority.¹³ Illustrations of this rule have been given in previous sections.¹⁴

select competent and trustworthy officers. And responsibility for exemplary damages, in cases of ratification, will be an admonition to prompt dismissal of offending officers, as their retention might well be held evidence of ratification. The interest of these corporations and of the public, in such matters, should be made alike as far as possible. And we hold the rule, as we have stated it, the justest and safest for both."

12. *Isaacs v. The Railroad*, 47 N. Y. 122; *Higgins v. Turnpike Co.*, 46 N. Y. 23; *Vanderbilt v. Turnpike Co.*, 2 *id.* 479; *Railway Co. v. Russ*, 57 Fed. 822, 6 C. C. A. 597, 18 U. S. App. 279; *Seymour v. Greenwood*, 7 H. & N. 355; *Limpus v. The Omnibus Co.*, 1 H. & C. 526; *Goff v. The Railway*, 3 El. & El. 672; *The Thames Steamboat Co. v. The Railroad*, 24 Conn. 40; *Poulton v. The Railway*, L. R. 2 Q. B. 534. *Ante*, sec. 960.

13. *Railway Co. v. Davis*, 56 Ark.

51, 19 S. W. Rep. 107; *Railway Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778; *Atlantic, etc., R. Co. v. Condor*, 75 Ga. 51; *Georgia R. Co. v. Horner*, 73 Ga. 251; *Railway Co. v. Brauss*, 70 Ga. 368; *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. Rep. 820, 97 Am. St. Rep. 376, 61 L. R. A. 122; *Railroad Co. v. Long*, 5 Kan. App. 644, 47 Pac. Rep. 993; *Memphis, etc., Packet Co. v. Nagel*, 15 Ky. Law Rep. 742; *Cincinnati, etc., Ry. Co. v. Richardson*, 14 Ky. Law Rep. 367; *Palmer v. The Railroad*, 92 Me. 399, 42 Atl. Rep. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Goddard v. The Railway*, 57 Me. 202; *Hanson v. The Railway*, 62 Me. 84; *Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277; *Railroad Co. v. Harper*, 83 Miss. 560, 35 So. Rep. 764, 102 Am. St. Rep. 469, 64 L. R. A. 283; *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 453; *Kellett v. The Railroad*, 22 Mo. App. 356; *Evans v. The Railroad*, 11 Mo. App. 463;

Hopkins v. The Railroad, 36 N. H. 9; but see Fay v. Parker, 53 N. H. 342, and Bixby v. Dunlap, 56 N. H. 456; Rose v. The Railroad, 106 N. Car. 168; Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162; Pittsburgh, etc., R. Co. v. Slusser, 19 Ohio St. 157; Ammons v. Railway Co., 138 N. Car. 555, 51 S. E. Rep. 127; s. c. 52 S. E. Rep. 731; Richardson v. Railroad Co., — S. Car. —, 51 S. E. Rep. 261; Railway Co. v. O'Quinn, — Ga. —, 52 S. E. Rep. 427.

In Georgia R. Co. v. Olds, 77 Ga. 673, a passenger, who had what he supposed was a good ticket, but which, through the mistake of the ticket agent, was not, was ejected from the train. "But when to this," said the court, "are added other wrongs and violations of rights and duties; when he was insulted and vilified by their agents while under their protection; when they failed to exercise the 'extraordinary diligence' which the law requires at their hands for his safety and comfort—surely these are circumstances entitling him to compensatory damages, as well for wounded feeling as for the inconvenience, pain and suffering for this wanton and cruel violation of his rights by the conductor and his assistants; and if the jury believed these facts they were authorized, in addition, to give vindictive damages to deter him from the repetition of similar offenses."

14. See *ante*, § 1094, *et seq.*

In Goddard v. The Railway, *supra*, Walton, J., said: "But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own wilful

and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation, and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; that they are simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

"We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly or impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its

Sec. 1443. (§ 815b.) Same subject—Effect of servant's good faith.—But to justify the application of the rule the conditions mentioned must exist, *i. e.*, there must have been elements of malice, rudeness, insult or wilful indignity.¹⁵ Hence, if the serv-

application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation; and yet, under cover of its name and authority, there is in fact as much wickedness and as much deserving punishment as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped nor put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss, it does seem to us that the doctrine of exemplary damages is

more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured who will not handle and smash trunks and bandboxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict the great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations, and that is the pocket of the monied power that is concealed behind them, and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their place, and not before."

15. *Texas Ry. Co. v. Johnson*, 75 Tex. 158; *Holmes v. Railroad Co.*, 94 N. C. 318; *Louisville, etc., R. Co. v. Guinan*, 11 Lea, 98; *Curl v.*

ant, in performing the act in question, was but in good faith attempting to do what he believed to be his duty, though mistakenly, exemplary damages cannot be awarded, though full compensation will be given.¹⁶ In other cases, however, it has been held proper to allow exemplary damages against the company where, though the conductor acted without malice and in good faith, he was yet the instrument by which the company in-

Railway Co., 63 Iowa, 417; Milwaukee R. Co. v. Arms, 91 U. S. 489; Forsee v. Railroad Co., 63 Miss. 67; Barnett v. The Railroad, 75 Mo. App. 446.

16. Fitzgerald v. Railroad Co., 50 Iowa, 79; Curl v. Railway Co., 63 Iowa, 417; Hoffman v. Railroad Co., 45 Minn. 53, 47 N. W. Rep. 312; Railway Co. v. Newman, 98 Md. 507, 56 Atl. Rep. 973; Smith v. The Railroad, 87 Md. 48, 38 Atl. Rep. 1072.

In the case of Hoffman v. Railroad, *supra*, the court say: "In compliance with the sixth request of the plaintiff, the court instructed the jury, in substance, that, if they believed that the conductor refused to permit the plaintiff to ride on this ticket, the conductor giving no excuse therefor to the plaintiff, except that the ticket was 'scalped' (bought from a ticket broker), and that no excuse therefor existed, they would 'have a right to presume that the conductor acted malevolently, and with a tyrannical or oppressive motive; and, if you so believe from all the evidence in the case, you have a right to award the plaintiff any amount as damage that is proper, not exceeding the sum of \$1,500.' We understand the words, 'and that no excuse therefor existed,' to mean that there was no legal excuse for the conductor refusing to

accept the ticket, and we hold that there was no such excuse. As applied to the facts of this case, the instruction embraced, in effect, the proposition that if the conductor gave no other excuse for his refusing the ticket than that it had been 'scalped,' and if his refusal was not legally justifiable, the jury might presume that he acted from motives of malice, and hence that punitive damages might be awarded. We deem this instruction to have been erroneous under the circumstances of this case. It seems to us entirely apparent from the conduct of the conductor, and from the whole case, that, while he was not legally justified in refusing to allow the plaintiff to ride on this ticket, he was not actuated by malice, however mistaken he may have been as to the legal rights of the plaintiff and as to his own duty in the premises. The malice which will justify the awarding of exemplary damages—damages in excess of what may sufficiently compensate for the injury done, and which are awarded for the purposes of punishment and example—is not the mere doing of an unlawful and injurious act. The wrong must be malevolently done, or in wanton indifference to the rights invaded. See *man v. Feeney*, 19 Minn. 79. And see *Du Laurans v. Railroad Co.*, 15

flicted an aggravated wrong upon the passenger.¹⁷ The decision in the case cited, however, was made in view of a section in the Georgia code, which may have influenced the decision. This section of the code is as follows: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff."

Sec. 1444. (§ 816.) Same subject—Evidence of authority or ratification.—Whether authority was given to the employee or servant for his misconduct or negligent act, or whether there has been a subsequent ratification by the carrier, must depend upon the conclusions which may be justly drawn from the circumstances. It can rarely, if ever, happen, of course, that the passenger will have it in his power to prove either an express authority or a direct ratification. Where such authority or

Minn. 49; *Carli v. Transfer Co.*, 32 Minn. 101; 5 Amer. & Eng. Enc. Law, p. 21, notes. Of course, such malice may often be inferred from the nature of the wrong, but we think that such an inference as to the conductor in this case is rebutted by his course of conduct, and by the circumstances to which we have only briefly referred. The defendant is entitled to a new trial by reason of the error involved in the above instruction."

Compare this case with the one following:

17. Thus in *Georgia R. Co. v. Homer*, 73 Ga. 251, the court say: "We see no error in the charge that exemplary damages might be recovered with or without actual force in a case like this. The conductor took the passenger by the arm and led him to the platform, and he got off. All was done kindly, but by the commanding authority of the conductor. The

passenger lost nothing by not resisting and requiring force to eject him. On the contrary, he was right to yield to authority, and throw himself for remuneration upon the law. Of course, rude and violent conduct would be a circumstance to demand increase of damage against the company, but more than actual damage is recoverable for the act of putting off, by the mere moral force of authority, a passenger who had a ticket and was entitled to ride to Lithonia, before he got there. The inconvenience, the insult in the presence of fellow passengers and the wounded feelings of the passenger may be considered and weighed. Code, § 3066. The act, without considering the intention, may be aggravating; and certainly it is very aggravating, where one has bought a right to be transported to Lithonia, for him to be ejected on a field where

ratification is claimed, the question must be submitted as one of fact, to be determined generally by the conduct of the principal, either prior or subsequent. It has been held that retaining the guilty agent in the employment of a railway company after notice of his improper conduct is a circumstance which will justify the submission of the question of a ratification of such conduct by the company to a jury, and that the jury would be well warranted in finding from this fact that there had been a ratification; and especially, it was said, would this be so, if the company had not only retained the servant in its employment, but had promoted him to a position of more responsibility.¹⁸ And in several cases the fact that the carrier had continued the servant in its employment has been treated as one, or, if not proving a ratification of his misconduct, at least as affording good ground for the enhancement of the amount of damages.¹⁹

there was no depot, or cross-road even, before he reached his destination. Code, 3066, *supra*."

18. *Craker v. The Railway*, 36 Wis. 657; *Bass v. The Railway*, 39 *id.* 636; s. c. 42 *id.* 654.

In a later case in the same court (*Patry v. Railway Co.*, 77 Wis. 218, 46 N. W. Rep.), Lyon, J., said: "There is no testimony in the case tending to show that the conductor acted in a reckless, wanton or insulting manner, or that he was influenced by malice or any other improper motive. On the contrary, it conclusively appears that he acted throughout in a considerate and gentlemanly manner, and in the belief that he was only discharging his imperative duty to his employer. Such being the facts, as a matter of course, this is no case for the infliction of punitive damages, and would not be, even were the action against the conductor instead of the company. But, if the conductor so treated the plaintiff as to be liable to puni-

tory damages, were the action against him, still, under the rule which prevails in this state, established in *Craker v. Railway Co.*, 36 Wis. 657; *Bass v. Same*, 42 Wis. 654, and other cases, the defendant company is not so liable, for the reason that there is no testimony tending to show any ratification by it of the acts of the conductor. Under the above cases, had the company retained the conductor in its employ, after having been fully informed of his conduct, as the plaintiff claims, and the jury found it to have been, that would have been a ratification of his conduct which would subject the company to liability for punitive damages. But there is no testimony in the case tending to show the existence of these essential facts."

19. *Cleghorn v. The Railroad*, 56 N. Y. 44; *Goddard v. The Railroad*, 57 Me. 202; *New Orleans, etc., R. R. v. Burke*, 53 Miss. 200; *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. 52.

But it is said that the act of a servant, for which the master was not liable when committed, does not become the act of the master because he afterwards refuses to discharge the servant.²⁰ And in the same court it has been said that the whole doctrine of *ex post facto animus* as a basis for exemplary damages is an anomaly.²¹

20. *Gulf, etc., R. Co. v. Kirkbridge*, 79 Tex. 457; *Gulf, etc., Ry. Co. v. McFadden* (Tex. Civ. App.), 25 S. W. Rep. 451, citing *Railway Co. v. Reed*, 80 Tex. 362, 15 S. W. Rep. 1105.

21. *Dillingham v. Russell*, 73 Tex. 47. In this case it is said:

"If, in performing any duty within the line of his employment, the servant uses unnecessary force in doing an act, lawful within itself, and thereby commits a trespass or crime, then the act may be deemed one for which the master is civilly responsible; but if the act be in itself illegal, however performed or by whomsoever done, then the master ought not to be held liable unless he advised or in some way participated in the unlawful act.

"The court below charged that the act of the servant, with all of the servant's wilfulness and malice, would be imputed to appellants if, with knowledge of his misconduct, they kept him in their employment, and so without reference to whether the act was within the line of the conductor's duties, or one illegal in itself, without reference to the manner of its execution.

"If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee, from the battery made

upon him by the conductor, than that they had ratified his act, could their liability be fixed on that ground, however clear their subsequent approval of his act might be made to appear?

"In order to constitute one a wrong-doer by ratification the original act must have been done in his interest or been intended to further some purpose of his own.' *Cooley on Torts*, 127; *Wilson v. Barker*, 4 B. & Ad. 271; *Wilson v. Tumman*, 6 Man. & Gr. 241; *Broom's Legal Max.* 873; *Wood's Master and Servant*, 598; *Bird v. Brown*, 4 Exch. 798; *Sutherland v. Sutherland*, 69 Ill. 481; *Railway Co. v. Broom*, 6 Exch. 326; *Moak's Underhill on Torts*, 38.

"In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under any pretense of authority from them, or to further any interest of themselves or the corporation whose business and property they were controlling, and there was no ground on which to base ratification, which is but an agreement, express or implied, by one to be bound by the act of another performed for him. If the appellants could not be held to have ratified their servant's unauthorized, wilful, malicious act, not done in their interest or for their benefit in fact or pretense, it is not perceived on what ground they

Sec. 1445. (§ 817.) Same subject—Carrier only liable where servant would have been.—The carrier cannot ordinarily be held liable to exemplary damages unless the servant himself would be so liable under the circumstances, if the action

can be held to be affected by the *animus* with which the servant committed the act, and unless they could be so affected there is no legal ground for awarding against them exemplary damages.

"If the servant's act be one not authorized by the master, or one not done in the exercise of a power fairly arising from the character of his employment, but be an act done for the use or benefit of the master, then the master may doubtless ratify the act of the servant through which a tort was committed; and it may be that in such a case the ratification of the master would fix upon him the bad motive which prompted the servant's act, and thus impose on the master a liability even for exemplary damages. It has been so held by the courts that hold the master not liable for exemplary damages in all cases in which the servant is. *Bass v. Railway Co.*, 42 Wis. 654. Such may be the effect of the decisions in this state to which we have referred, though there are contrary holdings. *Sutherland v. Sutherland*, 69 Ill. 481. Such a question, however, is not before us.

"Relying as appellee does on the injury inflicted upon him by the conductor after he took a seat in the car, we are of the opinion, under the evidence, that he shows no case entitling him to exemplary damages under the decisions heretofore made in this state to which we have referred, and that a case

is not shown in which the jury should have been charged that they might find appellants had ratified the act of the conductor.

"If, however, the case were different, and it appeared that the conductor's act was done in the course of his employment, giving to this any intendment arising from his position and the nature of his duties, even then it seems to us that it cannot be held as matter of law that the mere retention of the conductor in the same position after knowledge of his misconduct operates a ratification of his wilful and malicious act, and thus fixes his evil motive on his employers.

"The whole doctrine of *ex post facto animus* as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought imputed, which the court below informed the jury existed as a matter of law, if the conductor was retained in the service after knowledge of his misconduct.

"There are cases which hold that the retention in service under such circumstances amounts to ratification of acts that may be ratified, but it seems to us that this is not necessarily true, and that when ratification is an issue this should be left to the jury or court trying the cause, under all the evidence, to be passed upon as any other fact in issue."

had been brought against him instead of the carrier;²² but this cannot be true as an universal rule, for there may be cases in which the servant acts in entire good faith and without malice in enforcing a rule imposed by his principal, but the enforcement of which may be such a wrong that the passenger would be entitled to exemplary damages as against the principal. And it does not follow that the converse of this principle is true, and that, therefore, whenever such damages may be recovered from the employe in an action against him for wilful, malicious or oppressive mistreatment of the passenger, the principal will be liable to the same extent without having made itself so by having authorized or ratified the act.²³

Sec. 1446. (§ 818.) When carrier may disprove wrongful intent.—It being necessary, in order to justify exemplary damages, that there should have been wilful wrong, recklessness or malice, the carrier may show, when such damages are claimed upon the ground of personal mistreatment of the passenger, that he or his employe acted under the honest belief of the existence of facts, which, if true, would have justified his conduct towards the passenger, and that consequently it was not prompted by malice or a wilful disregard of the rights of the passenger. Thus, where the passenger, having surrendered his ticket to the conductor of a train, who had retained it without giving him any evidence of the fact, was afterwards ejected from the train by the same conductor, because he was without a ticket or other evidence of his right to be carried upon it, the testimony of the conductor to the effect that he did not at any time believe that he had previously held and surrendered his ticket as he asserted, and that he had himself conscientiously acted as he thought his duty required him to do, was held to be admissible, in view of the probable claim which might be made by the plaintiff to exemplary damages, if the fact should appear

22. *Hamilton v The Railroad*, 53 N. Y. 25; *Townsend v. The Railroad*, 56 *id.* 295.

23. *The Great Western Ry. v. Miller*, 19 Mich. 305; *Detroit Daily Post v. McArthur*, 16 *id.* 447.

to be otherwise.²⁴ But if there be no pretense for claiming such damages, or if the right to them be disclaimed by the plaintiff, such evidence would be of course inadmissible, as the intent or motive with which the wrongful act was done could not influence the amount of the verdict, when only compensatory damages could be recovered.²⁵

- 24.** *Yates v. The Railroad*, 67 N. Y. 100. See, also, *Hamilton v. The Railroad*, 53 *id.* 25. intention, punitive damages cannot be awarded. *Railway Co. v. Newman*, 98 Md. 507, 56 Atl. Rep. 973. See, also, *Smith v. The Railroad*, 87 Md. 48, 38 Atl. Rep. 1072; *Railroad Co. v. Neely*, 91 Va. 539, 22 S. E. Rep. 367.
- 25.** *Yates v. The Railroad*, *supra*.

INDEX.

[REFERENCES ARE TO SECTIONS.]

ABANDONMENT—

Of goods for unreasonable delay in transportation, not permitted, 651.

Carrier not entitled to freight if he abandons the goods, 800.

When carrier entitled to freight *pro rata itineris* on abandonment of voyage, 815.

Abandonment of custom to sell tickets at reduced rates, 1035.

ABSENCE—

Effect of absence of consignee upon the liability of the carrier, 723.

Duty of carrier to give notice to consignor of absence of consignee arises only when personal delivery required, 725.

Rule has no application to railway companies, 725.

Carrier not liable for omission to give notice unless loss consequent upon such omission, 725.

From vehicle temporarily does not terminate passengership relation, 1012.

Continues to be passenger though temporarily absent from vehicle, 1012.

Absence from vehicle to send telegram, 1012, note 8.

Absence from vehicle to obtain refreshments, 1012.

Absence from train to transact passenger's own business, 1012, and notes.

Leaving train at intermediate point and going to hotel, 1012, note 9.

Distinction exists between passengers on through and local trains leaving vehicles, 1012.

ACCEPTANCE (See DELIVERY; COMMON CARRIER; PASSENGER CARRIER) —

By common carriers—

Carrier's agent may refuse to accept goods at unusual place, 121.

Of the carrier's duty to accept and carry the goods, 143.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—*By common carriers*—con.

May by public notice relieve himself from obligation to carry particular kind of goods, 144.

May refuse to carry goods improperly packed or otherwise unfit for carriage, 145.

Or of a dangerous character, 145.

Or even when contents unknown, if suspicious, 145.

Press of business may justify refusal of carrier to accept goods, 146, 495.

May refuse to accept when he does not carry to place where owner wishes to send, 147.

Or when tendered at an unreasonable hour or place, 147.

Or when goods would be exposed to unusual danger, 147.

Or when cars must be used in freighting coal for his own consumption, 146, note 6.

Carrier may make reasonable regulations as to manner in which commodity will be received for transportation, 147, note 9.

Carrier obliged to accept only from owner of goods or his authorized agent, 148.

Acceptance in good faith from, and delivery to, person not owner but in apparent control is not a conversion, 148.

But taking by mistake other goods than those he is directed to take may be a conversion, 148.

Mandamus will not lie to compel carrier to accept and carry goods, 149.

Mandatory injunction lies to compel acceptance and carriage of goods, when, 149.

May refuse to carry until freight paid, 150.

Actual acceptance may waive reasons for refusal, 151.

On unexpected influx of business, facilities should be equitably apportioned among shippers, 495.

In accepting goods carrier must inform shipper of necessary delay, 495, 496.

Duty of carrier to accept goods for transportation, 511.

When railroad company will be compelled to accept goods at points on a switch, 512, note 60.

Carrier cannot make insurance of goods for his benefit a condition precedent to his acceptance of them, 784.

Carrier has no right to demand information as to quality of goods or contents of packages, as condition of acceptance, 795.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—*By common carriers*—con.

Carrier may demand compensation in advance, and as condition of acceptance of goods, 799.

Measure of damages for failure to accept and carry, 1359.

By consignor or consignee—

Acceptance of carrier's receipt creates a contract according to its terms between him and the shipper, 408, 409.

Some courts hold mere acceptance insufficient, 410.

Rule in Illinois, 410.

Acceptance of goods by proper person will waive objections to improper delivery by carrier, 664.

Whether acceptance of part payment for goods is a waiver of claim against carrier for damage to remainder, 678, note 44.

On refusal of consignee to accept the goods, carrier holds as warehouseman, 685.

Consignee not bound to accept goods from carrier by water on Sunday or other legal holiday when labor forbidden, 692.

On holidays when labor not forbidden bound to accept, 692.

Unless right to refuse on such day established by custom, 693.

Labor Day, 692, note 21.

Fourth of July, 693.

Consignee must remove goods within a reasonable time, 694.

Whether carrier who is bound to make a personal delivery must give notice of a refusal of the goods by the consignee is a question involved in conflict of authority, 720, 721.

Consignee peremptorily refusing to accept C. O. D. goods, carrier may immediately return goods to consignor, 729.

Not compelled to return, but may notify consignor and await orders, 729.

Consignee accepting goods, promise to pay freight is implied, 807.

Acceptance of the goods, or of their proceeds, by owner must have been voluntary to give carrier claim for *pro rata* freight, 815.

Whether acceptance voluntary, how determined, 815, 816.

Carrier refusing to repair ship after disaster, or to procure another vessel, or refusing to prosecute voyage, acceptance of goods by owner no waiver of further carriage, 816.

Acceptance by agent or supercargo or by underwriter equivalent to acceptance by owner, 816.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—*By consignor or consignee*—con.

When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.

Consignee, by merely accepting goods, does not become liable for payment of demurrage, 853.

By passenger carriers—

In England, railway and canal companies bound by statute to carry all who offer, 962.

There may be public carriers of passengers as well as private carriers of persons for hire, 963, note 43.

In America, public passenger carriers bound to carry all who offer against whom there is no legal objection, 963.

Having secured right to enter, passenger may make reasonable effort to enter car, and carrier liable for any tort against his person in refusing admittance, 963.

Passenger entitled to recover where prevented by gate-keeper from reaching train, 963, note 44.

Railroad companies may lawfully refuse to carry passengers on freight trains, 964.

Where railroad company has so divided traffic, presumption is that person riding on freight train is not a passenger, 964.

But this presumption may be overcome by showing long continued and notorious disregard of such a regulation, 964.

Railroad company may exclude passengers from "pay train," 964, note 1.

No presumption that freight train carries passengers from fact that it has caboose attached, 964, note 2.

Person relying on long continued and notorious disregard of company's regulation not to carry passengers must not have known of the company's regulation, 964, note 3.

In absence of rule or established custom, presumption is that those in charge of freight trains have no authority to accept passengers, 964.

Presumption may be overcome by order of superior officer of conductor, 964, note 4.

Some courts, however, hold that person applying may rely on authority of conductor, 964.

But he has no right to rely on authority of a brakeman, 964. So he cannot claim rights of passenger where he colludes with conductor, 964.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—*By passenger carriers*—con.

And conductor certainly cannot authorize him to ride upon engine, 964.

Where railroad company receives and undertakes to carry passengers on freight train, it cannot secretly limit conductor's authority, 964.

And person entering train at direction of station agent is not a trespasser, 964.

If ejected while train is in motion, or at dangerous or improper place, carrier liable, 964.

Passenger must comply with railroad's reasonable requirements for riding on freight trains, 964.

And must accept the necessary incidents and inconveniences thereof, 964.

Railroad company under no duty to accept passengers on special or emergency trains, 965.

Passenger carrier may refuse to accept persons refusing compliance with reasonable regulations, 966.

Or who are of bad character, 966.

Or who are afflicted by contagious disease, 966.

Or gamblers or monte men, 966, note 16.

Or person who refuses to pay fare, 966.

Or persons whose object is to interfere with business of carrier, 966.

Or one who is likely to become a burden on his fellow-passengers, 966.

Or persons likely to excite popular violence, or to be exposed to peculiar danger at destination, 966.

Or person warned to stay away from destination by vigilance committee, 966, note 17.

If, notwithstanding physical disability, carrier can easily infer that person is able to travel alone, he cannot refuse to accept him as a passenger, 966.

So if proper assistance is provided disabled person, carrier cannot refuse him carriage, 966.

In absence of usage to contrary, carrier may refuse to admit person in car carrying packages of merchandise, 966, note 17.

Blindness unfits person for safe travel, if unaccompanied, 967.

But agent should listen to explanation as to competency of blind person to travel alone, 967.

[REFERENCES ARE TO SECTIONS.]

ACCEPTANCE—*By passenger carriers*—con.

Carrier may insist that insane persons be properly attended, safely guarded, and securely restrained, 968.

In violent cases, carrier may require seasonable notice in order to make proper arrangements, 968.

Carrier may refuse admittance to person so intoxicated as to be dangerous or annoying, 969.

If accepted, however, intoxicated person cannot be ejected so long as he demeans himself peacefully and properly, 969.

Rule of carrier excluding intoxicated persons not admissible against person afflicted with St. Vitus dance, 969, note 21.

Carrier not bound to accept persons whose object is to interfere with interests or business of carrier, 970.

Carrier may grant exclusive right to solicit on vehicles, 970.

But cannot deny admission to vehicle to person merely because he does something detrimental to carrier's business at other times and places, 970.

Cannot deny admission to person merely because he is a "ticket scalper" elsewhere, 970, note 25.

Conductor of train not required to inquire into cause of arrest and authority of officer when latter takes prisoner with him on train, 971.

By passenger—

Conclusiveness of acceptance of contract ticket, 1070.

. ACCIDENT—

Private carrier—

Private carrier for hire does not insure against loss by unavoidable accident, 40.

Liability of private carrier for hire for goods subsequently lost by accident, 41.

Common carrier—

Inevitable accident no excuse when common carrier has contracted to carry in prescribed time, 625.

In case of accident, carrier must give goods reasonable care and attention, 631-633.

In case of accident, carrier should place cars containing live stock in position where shipper can attend to wants of animals, 634, note 36.

Carrier entitled to freight, though goods injured by accident without his fault, 802.

If accident happens to vessel while waiting on demurrage,

[REFERENCES ARE TO SECTIONS.]

ACCIDENT—*Common carrier*—con.

obligation to pay demurrage is suspended while vessel is away for repairs, but resumed on her return, 851.

Immaterial that quay berth falls vacant during her absence, 851.

Passenger carrier—

Not insurer against injuries to passenger through mere accident, 893, 900.

Carrier not liable where his servant accidentally falls against passenger, 900, note 25.

Nor where fellow passenger allows window to suddenly fall on passenger's hand, 900, note 25.

Nor where passenger, jumping on moving train, comes in contact with porter and is injured, 900, note 25.

Nor for injuries due to passengers all rushing to one side of boat, 901.

Passenger carrier not liable for mere accident on safe platform, 933.

Carrier not liable for not guarding against accidents not reasonably to be anticipated, 940.

Carrier not liable for injury due to slipping on brass nosing of step leading to platform which had been worn smooth by constant use, 940.

Carrier need not provide hand railings to station stairway when it is protected by walls on both sides, 940.

Carrier not liable for injury due to stumbling over weighing machine, used for a long time without an accident, 940.

Nor where horse broke away and came upon platform and injured passenger, 940.

Nor for explosion of heating apparatus in hotel where ticket office was maintained, 940.

Mere proof of accident not sufficient to raise presumption of negligence, 1412.

If accident connected with means or instrumentalities of transportation, a *prima facie* presumption of negligence will arise, 1413.

ACCOMMODATIONS (See STATIONAL FACILITIES)—

Duty of carrier to supply vehicle with necessary, 922, 1113.

Accepting poorer accommodations rather than not to make journey, 1156.

ACQUIESCENCE (See SHIPPER; KNOWLEDGE; STOWAGE)—

Of shipper to stowage on deck, 603, note 21.

Of shipper to charging of certain rate, 804, note 29.

[REFERENCES ARE TO SECTIONS.]

ACT OF GOD—

Common carrier—

Carrier not liable for losses caused by, 265, 267.

May become so by contract, 266.

Language must be clear to have this effect, 266, 267.

What is meant by the "acts of God," 269.

Act of God no defense for failure of carrier to furnish cars at certain time and place, 268, note 4.

Some courts give broader meaning to "act of God" than other courts give, 270, 271.

Inevitable accident in no way attributable to fault of carrier or human agency, 270-273.

Anchor, concealed, 275.

Bank, washing away of, 274.

Boiler, explosion of, 281.

Collision on land, 281.

Collision of vessels, 281.

Earthquake, 271, 283.

Elements, 271.

Explosion, 281.

Fire, 279, 280.

Floods, 271, 292.

Freezing of canals or rivers, 273.

Freshet, 270, 282.

Hazy weather, 278.

Hurricane, 286.

Inundation, 271, 282.

Landslide, 284.

Lightning, 271.

Rain-fall, 274, note 17.

Rock, hidden, 270.

Snag, 270.

Snow-storm, 278, 285.

Squall of wind, 275, 276, 277.

Tempest, 274, note 17.

Tide, reflux of, 289.

Washing away bank, 274.

Wind, 272, 275, 276, 277, 280, 286.

Act of God must be proximate cause of loss, 274.

Human agency must not have intervened, 275.

Carrier responsible for loss arising from mistake, loss of presence of mind, or want of skill or judgment in avoiding danger, 275.

[REFERENCES ARE TO SECTIONS.]

ACT OF GOD—*Common carrier*—con.

Burden of proving loss occurred through act of God is on carrier, 287.

When loss would not have occurred except through negligence of carrier, he will be liable though act of God proximate cause, 288-292.

Carrier not excused if he negligently venture forth from place of safety, 288.

Or if he negligently exposes the goods to danger, 292.

Or if his vessel be unseaworthy, 293.

If he deviate from usual course, responsible for any loss arising from any cause, 294-296.

Whether carrier liable for loss by act of God which would not have occurred but for his unreasonable delay, 297-307.

Act of God will not excuse if carrier has wrongfully refused to deliver goods, 313.

Burden of proof as to carrier's contributory negligence, 312.

Perils of the sea not synonymous with act of God, 483.

Interruption or delay of journey, while carrier is not at fault, caused by act of God, does not justify carrier in terminating it, 801.

Passenger carrier—

When carrier is liable for injury to passenger although the immediate cause of injury is an act of God, 913.

When act of God will excuse performance of contract to carry passengers and their baggage by carriers by water, 1169.

Carrier not liable for loss of baggage caused by, 1241.

ACTIONS AGAINST CARRIERS—

AGAINST COMMON CARRIER—

Who may sue for loss of or damage to goods—

Presumption that consignee is owner and has right to sue, 1304.

But this presumption not conclusive, 1304.

Question at whose risk goods are sent will usually determine question who is proper person to sue, 1304.

Recovery by person who takes no risk in transportation, no protection to carrier against recovery by owner, 1304.

Mere servant or agent with whom contract is made, who has no interest in transaction, cannot sue, 1305.

One having special property in goods may sue, 1305.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

Who may sue for loss of or damage to goods—con.

Factor, intrusted with goods, may sue for damage done them, 1305.

Warehouseman, intrusted with goods, may sue for damage done them, 1305.

Owner may sue, 1306.

Although contract for carriage made by agent, principal may sue, 1306.

Either general or special owner, or both of them, may sue, 1306.

But recovery by one will bar subsequent suit by other, 1306.

And satisfaction as to one will be satisfaction as to both, 1306.

Person making contract with carrier may sue, 1307.

Interest in goods not necessary to enable person making contract with carrier to sue, 1307, 1308.

Consignor, without interest in goods, may sue, although contract of shipment be oral, 1308.

States which follow doctrine that person making contract with carrier may sue, although he have no interest in goods, 1309.

This doctrine supported by English cases, 1310.

Advantages of rule that person making contract, although without interest in goods, may sue, 1311.

Recovery by consignor having no interest in goods inures to benefit of owner, 1311.

Contract need not be in writing to enable shipper to sue, 1313.

Whenever carrier accepts goods of consignor, the latter may sue for loss or damage thereto, without regard to ownership, 1314.

But consignor, when not owner, must sue on contract, 1314.

Action in tort can be maintained only by real owner, 1314, note 22.

Contingent right of stoppage *in transitu* not sufficient interest in goods to entitle consignor to sue in tort, 1314, note 22.

Rule that only owner can sue, 1315.

Right of stoppage *in transitu* not sufficient interest in goods to entitle shipper to sue, 1315.

Mere agent without interest cannot sue in tort, 1316.

If consignor mere agent of consignee, he cannot sue, 1316.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

Who may sue for loss of or damage to goods—con.

When consignee may sue, 1317.

When consignor in shipment of goods has obeyed the instructions of consignee, latter may sue, 1317.

In such cases, title to goods will pass to consignee on their delivery to carrier, 1317.

When consignor has obeyed instructions of consignee, latter may sue either upon the contract or for a breach of duty, 1317.

But question whether title to goods has passed to consignee by a delivery to carrier will depend on intention of parties, 1317.

And this may always be shown, 1317.

If goods destroyed in transit, and consignee purchases them from owner, consignee may sue in own name, 1317.

And fact that goods are destroyed before consignee's purchase will make no difference, 1317.

If consignee refuse to receive goods under a mistake, he may sue for a refusal to deliver when a subsequent demand is made, 1317.

When consignor proper party, 1318.

When consignor ships without instructions, he is proper party to sue, 1318.

Where goods sent to consignee merely for purpose of approval, consignor proper party to sue, 1318.

Where consignor agrees to deliver goods at particular place to which they are consigned, he is proper party to sue, 1318.

Where consignor has directed carrier not to make delivery until price is paid, he is proper party to sue, 1318.

Where consignor has shipped goods conditionally, he is proper party to sue, 1318.

If sale is void for fraud or non-compliance with statute of frauds, title remains in consignor, and he is proper party to sue, 1319.

If consignee refuse to receive goods because of injury to them while in carrier's possession, consignor proper party to sue, 1319.

Where risk of transportation is upon consignor, he considered owner for purpose of maintaining action, 1320.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

Who may sue for loss of or damage to goods—con.

Person making contract with carrier may sue on same, whether he have any interest in goods or not, 1320.

Law will presume that consignee is owner and therefore entitled to sue, 1320.

But this presumption may be rebutted, 1320.

Consignee who has no interest in the goods, and who has incurred no risk, cannot sue, 1320.

Forms of the action—

In actions against carriers of goods, same law governs whether the form of action is *assumpsit* or tort, 204.

Form of action of less importance than formerly, 1321.

Until recent times, actions against carriers were *ex delicto*, 1322.

Obligations growing out of contract were therefore never associated with question of carrier's liability, 1322.

First recognition of theory of carrier's contract obligation, 1323.

Both *assumpsit* and case now resorted to, 1324.

When action in tort is preferable, 1324.

Where doubt as to who should be made defendants, action upon the case is preferable, 1324.

When action upon the case is resorted to, recovery against a part of those sued can be maintained, 1324, 1325.

Action upon the case is more proper form of action, 1324, note 3.

Action in case is several and not joint, 1325.

Plaintiff may elect to sue one or all in tort, 1325.

Carrier in partnership sued singly in an action *ex delicto* cannot plead non-joinder of others either in abatement or in bar of action, 1325.

Advantages of declaring in case, 1326.

Not necessary to state circumstances with as much certainty as is required in actions of *assumpsit*, 1326.

In action upon the case, count in trover may be included, 1326.

Advantages of declaring in *assumpsit*, 1327.

In *assumpsit*, plaintiff may join common counts with other counts to which common counts are applicable, 1327.

Action in *assumpsit* will survive to personal representative of plaintiff, 1327.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

Forms of the action—con.

Will survive also to personal representative of defendant, 1327.

In *assumpsit*, if any parties who are liable are omitted, it will be ground for plea in abatement, 1327.

In *assumpsit*, count in trover cannot be joined, 1327.

Distinctive character of declaration, 1328, 1329.

Difficulty of distinguishing between actions on the case and in *assumpsit*, 1328.

Mere allegation of promise in declaration not sufficient to make it one upon contract, 1328.

But averment of promise and a consideration will be construed as making declaration one upon contract, 1328.

If language of petition is equivocal, it will be construed as one in tort, 1328, note 13.

Distinction in form of action now generally unimportant, 1330.

By statute, in many states, recovery may be had against part of defendants, although action be upon contract, 1330.

By statute, in many states, actions founded in tort will survive to personal representative, 1330.

When action should be upon the contract, 1331.

Action should be upon contract where contract imposes greater duty than that imposed by law, 1331.

In Indiana, if action is founded on tort, and proof shows a special contract, variance will be fatal, 1331, note 15.

When action should be for breach of duty, 1332.

Action should be for breach of duty where contract contains terms limiting carrier's common law liability, 1332.

Action for loss of baggage carried gratuitously must be in tort, 1332.

Case and not *assumpsit* is appropriate form of action where goods damaged while in carrier's freight house, 1332, note 18.

The pleadings—

Important to determine if plaintiff's declaration be in case or *assumpsit*, 1333.

What declaration must allege, 1334.

Declaration must correctly state particular duty assumed by carrier, 1334.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

The pleadings—con.

Plaintiff may rely on more general statement when he proceeds *ex delicto*, 1334.

But if plaintiff enters into detailed statement of cause of action, proof must not vary from such statement, 1334.

In action *ex delicto*, allegation of undertaking to carry two or any number of things will support plaintiff's case if proof show an undertaking to carry one of them, 1334.

Declaration by consignor must allege ownership, 1334, note 1.

Declarations in particular cases, held sufficient, 1334, note 1.

Declarations in particular cases, held not sufficient, 1334, note 1.

When action on contract it must be set out correctly, 1335.

When action on contract it must be proven exactly as laid in declaration, 1335.

But contract need not be set out *in haec verba*, 1335.

Example of particularity in declaring on contract, 1336.

Variance between declaration and proof, fatal, 1337.

If declaration on contract state it to be absolute, and proof shows it to have been in alternative, plaintiff cannot recover, 1337.

Where contract is in alternative, it must be so stated, 1337.

Where declaration alleges contract was made with plaintiff and proof shows contract was made with another, plaintiff cannot recover, 1337.

Whole contract must be stated, 1338.

When action on contract containing limitations of liability, they must be stated, 1338.

Reasons for requiring particularity in statement of contract, 1339.

When suit on contract, mere collateral stipulations need not be set out, 1340.

Pleadings in action for statutory penalty for excessive overcharge, 1341.

Must state facts which bring case within statute, 1341.

Obligation arising under the statute should be stated, 1341.

How common-law action for excessive charge is affected by statutory action, 1342.

Common law remedy for excess of reasonable charge not suspended by statute imposing penalty for making such charge, 1342.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

The pleadings—con.

This not true where common-law remedy is expressly repealed, 1342.

What is sufficient averment of overcharge at common law, 1343.

Statement as to carrier's reward or compensation, 1344.

Not necessary to aver consideration in declaring for loss of goods, 1344.

But usual to allege that goods were accepted for carriage for certain reward, without stating what it was, 1344.

In action for refusing to accept goods, only necessary to aver readiness to pay freight, 1344.

In such case, allegation of tender unnecessary, 1344.

Carrier's defense to action—

In absence of statute, carrier must plead according to rules of common law, 1345.

If action is in case, plea of general issue of not guilty usually sufficient, 1345.

In action on contract, plea of general issue of *non-assumpsit* usually sufficient, 1345.

Forms of pleading now generally regulated by statute, 1345.

Under modern codes of practice, carrier required to answer somewhat more minutely and specially, 1345.

The evidence—what plaintiff must prove—

If right of action be created by foreign law, proof should be made in court of forum of what foreign law is, 207.

Delivery of goods to carrier must be shown, 1346.

Necessary, also, to show an undertaking, either express or implied, to transport, 1346.

Must show, also, a failure to perform contract or duty according to undertaking, 1346.

But where carrier denies having received goods, non-delivery to consignee need not be proved, 1346, note 1.

Plaintiff must not leave it doubtful in whose possession goods were at time of default, 1347.

In absence of through contract or partnership between connecting carriers, proof must show which carrier responsible for loss, 1347.

Presumption that last of several connecting carriers, who delivers goods in injured condition or deficient in quantity, received goods in same condition as when delivered to first carrier, 1348.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

The evidence—what plaintiff must prove—con.

Mere delivery of goods by final carrier in injured condition or deficient in quantity raises presumption that injury was occasioned by his fault, 1348.

But plaintiff must first show condition or quantity of goods when delivered to first carrier, 1348.

Final carrier may rebut presumption that injury or loss occurred while goods were in his possession by showing that he received them in condition in which he delivered them, 1348.

Fact that goods are concealed in boxes or packages does not relieve final carrier from showing that he received goods in condition in which he delivered them, 1348.

This presumption that final carrier was at fault applies also to intermediate carrier in whose possession goods are found in damaged condition, 1348.

Bill of lading given by first carrier competent evidence, in action against final carrier, to show condition or quantity of goods when delivered for transportation, 1348.

But in action against initial carrier, receipt of connecting carrier not competent evidence, 1348, note 13.

In action against first or any intermediate carrier for injury to goods delivered at destination in damaged condition, plaintiff must show that injury occurred while goods were in defendant's possession, 1348.

But first or any intermediate carrier may be held liable if his negligence has contributed to injury, 1348.

Rule in Michigan, 1349.

Contract with carrier may be either express or implied, 1350.

If contract be express, it must be proven as laid, whether action be in form *ex delicto* or *ex contractu*, 1350.

From necessity of proof of undertaking, although action be in form *ex delicto*, it is sometimes designated as an action *ex delicto quasi ex contractu*, 1350.

Express contract not necessary, 1351.

Undertaking to carry implied from proof of delivery with directions as to carriage, 1351.

No undertaking to carry implied from delivery to mere private carrier, 1351.

Burden of proof on plaintiff to show loss, 1352.

If this out of plaintiff's power, he must prove such circumstances as will create inference of loss, 1352.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST COMMON CARRIER—

The evidence—what plaintiff must prove—con.

Proof of delivery of goods to carrier and his failure, after reasonable time, to deliver them to consignee, *prima facie* evidence of liability, 1352.

Proof of delivery of goods to carrier in good order and his delivery of them at destination in damaged condition, *prima facie* evidence of liability, 1352.

What carrier may show—

Carrier may show limitation of time for commencing suit, 448.

Carrier may show that loss or injury was occasioned by the act of God, 1353.

Or by the public enemy, 1353.

Or by the fraud or fault of the owner of the goods, 1353.

Or that the loss or injury resulted from an inherent defect or infirmity in the goods themselves, 1353.

Or that by his contract he is excused, 1353.

In such cases, burden of proof on carrier to bring his case within exception, 1353.

Rule that burden of proof is upon carrier, after bringing his case within exception, to show that he was not negligent, 1354.

States following this rule, 1354.

Rule that burden of proof, after carrier has brought his case within exception, is upon shipper to show that carrier was negligent, 1355.

States following this rule, 1355.

Importance of question, 1356.

Burden of proof where property injured consists of live stock, 1357.

Where live stock is under carrier's exclusive control, delivery at destination in injured condition will be *prima facie* evidence of liability, 1357.

But if live stock was under control of shipper, he must show not only that he himself was free from negligence, but that carrier was at fault, 1357.

AGAINST PASSENGER CARRIERS—

Common-law action—

In actions for personal injuries against carriers of passengers, *lex loci delicti* governs, 205.

Contributory negligence governed by same law, 205.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—
Common-law action—con.

Proof of *lex loci delicti* must be made, 205.

At common law, right to sue for injury confined to passenger, 1376.

In case of death of person injured, right to sue at common law did not survive to personal representatives, 1376.

But if person injured stood in relation of servant to plaintiff, plaintiff could sue for loss of services, 1376.

Recovery by master limited to his pecuniary loss, 1376.

Parent's right of action, 1377.

Parent has right of action for injury to minor child, 1377.

But recovery will be limited to injury sustained by loss of child's service, 1377.

Mere relation of parent and child, without evidence of service, not sufficient to confer right of action upon parent, 1377.

Mere contract between parent and son, by which parent received portion of son's monthly earnings, not sufficient evidence of service, 1377.

Husband cannot recover, in action for loss of service of wife, damages for loss of prospective offspring, 1377, note 3.

Nature and extent of recovery, 1378.

Greater latitude allowed in recovery by parent in America, 1378.

Parent may recover not only for loss of service of child, but for expense of sickness of wife caused by nervous shock resulting from negligent killing of son, 1378.

Parent may recover for distress of mind occasioned by child's death, 1378.

Parent may recover for child's funeral expenses, 1378.

Parent may recover for medical expenses, 1378.

And this without reference to capacity of child to render service, 1378.

Parent may recover not only for loss up to time of trial, but also for prospective loss, 1378.

Where injury maliciously inflicted, parent may recover punitive damages, 1378.

Expenses of child's support during minority should be considered, 1378.

Father dead, mother may recover for loss of services of unemancipated child, 1378.

Also for nursing and medical attendance, 1378.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

Common-law action—con.

Husband's right to recovery for injury to wife at common law, 1379.

Husband may recover for loss of service and society of wife, 1379.

Also for expenses incurred, 1379.

Husband's right of action for injury to wife not extinguished by her death, 1379.

Nor by death of child or servant, 1379.

Where, by statute, fruits of wife's earning capacity belong to her, husband can recover only for loss of domestic services, 1379.

Where wife rendering voluntary service to husband in his business, he may recover for loss of such service, 1379.

Husband may recover value of his services while acting as nurse for his wife, 1379, note 13.

Relation of servitude necessary at common law, 1380.

Wife, child or servant, therefore, had no right of action for injury to husband, parent or master at common law, 1380.

Effect of child's contributory negligence on parent's action, 1381.

Effect of parent's negligence on his own action, 1382.

Effect of negligence of husband or wife on the other's action, 1383.

Where action is brought for joint benefit of husband and wife, negligence of wife attributable to husband, 1383.

Where action is for loss of services or society of wife, contributory negligence of either will defeat action, 1383.

Statutory actions—

At common law, no action maintainable for death of human being, 1384.

Lord Campbell's act, common law changed by, 1384.

Under Lord Campbell's act, wife, husband, parent or child may sue in name of executor of deceased person, 1384.

Jury may give such damages as are proportioned to injury, 1384.

Similar acts passed in most if not all of American states, 1385.

Many such acts framed with reference to actions against railroad companies, 1385.

Whether statute gives new right of action or merely removes common-law bar to recovery, 1386.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

Statutory actions—con.

Where statutes of both kinds exist, a recovery under one will be a bar to a recovery under other, 1386.

Extraterritorial effect of these statutes, 1387.

Generally only co-extensive with political jurisdiction of state, 1387.

Where proof of statute of state where death is caused is not made, common law presumed to prevail, 1387.

Existence of statute in state where action brought creates no right of action for injury inflicted in another state, 1387.

When right of action created in one state may be prosecuted in other states, 1388.

When right of action created by statute in one state is not inconsistent with statutes or public policy of another state, it may be enforced in courts of latter state, 1388.

Where right of recovery given by statutes is penal in character, it may be enforced in other jurisdictions, 1388.

Who may sue under these statutes, 1389.

Right of action usually given to personal representative of deceased person, 1389.

Who may sue when action is brought in state other than one where death is caused, 1390.

When action brought under foreign statute, suit must be by party named in statute, 1390.

Broad rule of United States Supreme Court, 1390.

Cases holding that action can be maintained only by executor or administrator appointed under laws of state where the statute sued under was enacted, 1390.

But contrary doctrine is supported by weight of judicial authority, 1390.

Effect of deceased's contributory negligence or his settlement of the action, 1391.

Settlement by beneficiary for the injury, or his own contributory negligence, will ordinarily bar him from right to a recovery, 1392.

But settlement by one beneficiary, or contributory negligence of one beneficiary, will not affect rights of other beneficiaries, 1392.

What law governs as to effect of contributory negligence or of a release on right of recovery, 1393.

When existence of kin must be shown, 1394.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—
Statutory actions—con.

Existence of next of kin must be shown where action is given for benefit of such persons, 1394.

Where action is given generally to personal representative of deceased, proof of next of kin need not be made, 1394.

Where action is given for benefit of deceased's estate, proof of next of kin need not be made, 1394.

Aliens, action may be brought for benefit of, 1395.

Posthumous children, recovery may be had for, when "children" of deceased are named in statute as beneficiaries, 1395.

Illegitimate children, no recovery can be had for, when only "children" named in statute as beneficiaries, 1395.

Grandchildren, no recovery can be had for, when only "children" named in statute as beneficiaries, 1395.

Effect of limitation as to time of bringing suit, 1396.

Limitation begins to run at time of wrongful death, 1396.

Time of limitation named in statute will control, 1396.

But if no time limitation exists in statute, statute of limitations of forum governs, 1396.

Measure of damages, 1397.

If statute is a survival statute, measure of damages is determined as in ordinary actions, 1397.

Where statute creates new cause of action, and recovery is given generally to personal representative of deceased, or for benefit of his estate, damages are such sum as deceased would probably have earned in his lifetime, 1397.

Where statute creates new cause of action, and recovery is for benefit of next of kin or certain designated beneficiaries, damages are pecuniary loss sustained by those entitled under the statute to benefits, 1397.

Word "pecuniary" looks to prospective advantages of pecuniary nature which have been cut off by premature death, 1397.

Word "pecuniary" excludes those losses which result from deprivation of society and companionship of relatives, 1397.

Evidence that deceased had life insured, immaterial, 1397, note 28.

Remarriage of widow, not to be considered in abatement of damages, 1397, note 28.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

Statutory actions—con.

Receipt of mortuary benefits, not to be considered in abatement of damages, 1397, note 28.

Savings of deceased will not decrease widow's recovery, 1397, note 28.

Evidence of pecuniary condition of next of kin, immaterial, 1397, note 28.

Damages for loss of prospective earnings must be specially pleaded, 1397, note 28.

Damages reckoned from date of death and not date of injury, 1397, note 28.

Damages for mental suffering of beneficiaries not to be allowed, 1398.

States following contrary doctrine, 1398.

Nominal damages, when may be recovered, 1399.

Rule in Illinois, 1399.

Punitive damages, when recoverable, 1400.

Jury, province of, in allowing damages, 1401.

Damages, question of, pre-eminently one for jury, 1401.

Damages, maximum limit of usually fixed by statute, 1401.

Distribution of damages recovered, 1402.

Usually provided for by statute, 1402.

In some states, distribution of damages left to jury, 1402.

In others, intestate laws govern, 1402.

Amount recovered, usually free from claims of creditors and legatees, 1402.

But where amount recovered is regarded as an asset of deceased's estate, creditors entitled to share in proceeds, 1402.

The form of action—

Action for injury to passenger may be in *assumpsit* or tort, 1403.

Form of action when exemplary damages are claimed, 1404.

When exemplary damages are claimed, action must be in tort and not in *assumpsit*, 1404.

Form of action when brought by personal representative, 1405.

When action brought by personal representative, it must appear that deceased party has suffered some pecuniary loss which impaired value of his estate, 1405.

Where action brought by personal representative, damages for personal pain and suffering of deceased not recoverable, 1405.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

The form of action—con.

Contrary rule in Tennessee, 1405.

Recovery must be for cause of action stated, 1406.

Proof must follow allegations, 1406.

Where plaintiff pleads specially the facts upon which he relies, he must confine his proof to those facts, 1406.

How form of action determined, 1407.

Allegation in declaration of contract or undertaking does not necessarily determine that action is not for breach of duty, 1407.

Contract often stated by way of inducement, 1407.

Although *assumpsit* maintainable, more appropriate form of action is in case, 1408.

The pleading—

Special damages must be pleaded, 1409, 1410.

The evidence—

Question of negligence of passenger carrier usually one of fact, 1411.

Burden of proof on plaintiff to prove negligence, 1411.

When negligence of carrier will be presumed, 1412, 1413, 1414, 1415.

Mere proof of accident, without more, not sufficient to raise presumption of negligence, 1412.

Circumstances attending accident must be shown, 1412.

If accident connected with means or instrumentalities of transportation, a *prima facie* presumption of negligence will arise, 1413.

This a just rule, 1413.

Negligence presumed where injury caused by breaking down or overturning of vehicle, 1414.

Or by derailment of train or of cars, 1414.

Or by collision between trains, 1414.

Or by an unusual jerk or jolt, 1414.

Or by parting of train, 1414.

Or by breaking down of bridge, 1414.

Or by falling of appliances within vehicle, 1414.

Or by obstruction placed by carrier too near track, 1414.

Or by spark from locomotive, 1414.

Or by block of coal thrown from engine, 1414.

Or by explosion of locomotive boiler, 1414.

Or by fall of gangway when carriage is by water, 1414.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

The evidence—con.

Or by bursting of a steam drum, 1414.

Or by failure of boat's machinery to operate, 1414.

Or by breaking of machinery, 1414.

Or by collision of boat with bank, 1414.

Or by overturning of stage-coach, 1414.

Or by horses attached thereto running away, 1414.

Or by breaking of axletree of coach, 1414, note 20.

But where injury is received by passenger while about carrier's premises, no presumption of negligence will arise, 1414.

No presumption of negligence will arise where accident causing injury to passenger is to him and not to vehicle, 1414.

Or where injury is caused by passenger stepping on object on station platform when alighting, 1414.

Or where injury is caused by rock becoming detached from adjoining hillside and striking train, 1414.

Proof of injury usually makes *prima facie* case of negligence, 1415.

Carrier, to rebut presumption of negligence, must show that accident was inevitable, or that same could not have been avoided by exercise of utmost care and foresight, 1415.

But where plaintiff proceeds to show just how accident happened, instead of resting on facts which would establish a *prima facie* case against carrier, his testimony must prove that accident was due to negligence, 1415.

Georgia, presumption of negligence under statute of, 1413, note 51.

- Nebraska, under statute of, carrier liable for any injury to passenger while being transported, unless same caused by criminal negligence of passenger or by his violation of some express rule of carrier actually brought to his notice, 1413, note 52.

Presumption of negligence, held not to arise where passenger has assumed risk of all injury, 1416.

Contributory negligence of passenger, burden of proof on carrier to show, 1417.

States following this doctrine, 1417.

But where plaintiff's own evidence shows him to have been guilty of contributory negligence, rule does not apply, 1417.

[REFERENCES ARE TO SECTIONS.]

ACTIONS AGAINST CARRIERS—AGAINST PASSENGER CARRIERS—

The evidence—con.

Cases holding that burden of proof is on plaintiff to show he was free from negligence, 1418.

To defeat recovery, plaintiff's negligence must have been proximate cause of injury, 1419.

How question of contributory negligence determined, 1420.

Where facts are in dispute or are such that reasonable minds may fairly draw different conclusions as to plaintiff's conduct, question of his negligence is for jury, 1420.

But where facts are not in dispute, and are such that all reasonable minds must concede that plaintiff was guilty of negligence, question of carrier's liability may be decided as one of law, 1420.

How common-law action for excessive charge affected by statutory action, 1342.

ACTIONS BY CARRIER—

Carrier may recover for injury to goods during bailment, 779.

May recover possession if wrongfully withheld, 779.

Carrier's right of action not inconsistent with right of action for same cause by general owner, 780.

But recovery by carrier for full value bars action by general owner, 780.

Carrier recovering full value, trustee for owner, 780.

Satisfaction of judgment for full value passes title to property to party against whom recovery is had, 780. •

Carrier paying for property lost or destroyed while in his possession, by wrongful act of another, subrogated to owner's rights, 781.

May recover possession from owner if taken from him wrongfully, 782.

Or when he has agreed to hold for party having paramount title, 782.

In trespass or trover against bailor, damages limited to value of special interest, 782.

Carrier may not sue for freight till goods delivered, 828.

Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

Carrier may retake possession of goods by writ of replevin when delivery obtained by consignee through trick or fraud, 871.

Carrier's remedy against manufacturer for defect in vehicle, 909.

[REFERENCES ARE TO SECTIONS.]

ADDRESS—

Effect of marking goods with particular address, 611.

Carrier's duty to make earnest effort to secure consignee's correct address, 669, *et seq.*

Effect of incorrect address on package, 677.

Notice of arrival of goods by railroad company to consignee unnecessary where address of consignee is unknown, and due diligence has been used to find him, 709.

ADMISSION—

Admissions of insurer in action against carrier are immaterial, 784, note 18.

ADOPTED CHILD—

Parent may recover for injury to, 1378, note 9.

ADVANCES—

Carrier's lien extends to advances made by preceding carriers, 867.

Final carrier may refuse to deliver until such advances have been paid, unless shown by the bill of lading, or otherwise, to have been prepaid, 867.

Final carrier need not investigate merit of prior charges which are apparently just, 867, note 24.

If charges are apparently regular, right of final carrier not altered by mistake, or omission of a previous independent carrier, 867, note 24.

Carrier, however, not authorized to pay every extortionate charge that preceding carrier may see fit to impose upon the goods, 867, note 24.

Connecting carrier need not delay receiving the goods until original contract with owner can be investigated, 867, note 24.

Carrier should examine bill of lading, if one accompanies the goods, to see if freight has been prepaid, 867.

If bill of lading silent, and carrier has no information from other sources, he is justified in advancing freight and will be entitled to lien therefor, 867.

Effect of statement in bill of lading, known to connecting carrier to be erroneous, that freight charges had been prepaid on latter's right against *bona fide* transferee of bill of lading, 867.

ADVERSE TITLE—

Duty of carrier when adverse title to property set up, 749.

May deliver property to real owner, 749.

Not estopped from showing want of title in the bailor, 749.

[REFERENCES ARE TO SECTIONS.]

ADVERSE TITLE—con.

Bailment raises strong presumption of right to possession, but not conclusive even against bailee, 749.

Carrier presumptively holds for his employer, 749.

And delivering to third person must show him entitled to possession, 749.

Cannot, of his own motion, set up adverse claim of another as excuse for withholding from bailor, 750.

Owner must himself set up such claim, 750.

Right to deliver to mortgagee after conditions in chattel mortgage broken, 750, note 35.

Carrier justified in withholding goods from bailor when notified by true owner, 751.

When party claiming has not paramount title over bailor, such holding a conversion, 752.

Withholding upon demand made by true owner a conversion, 752.

Carrier may bring bill of interpleader or take indemnity, 752.

Not conversion to hold long enough to satisfy honest doubt as to true ownership, 753.

Carrier not liable for not permitting goods to be seized on process not against owner, 754.

The duty and liability of the carrier when goods are detained by customs officials, 755.

Non-delivery through commendable motives of carrier no excuse, 756.

But carrier excused where goods are obnoxious to police power of state, or if they are infected with contagious disease, 756.

ADVERTISEMENTS—

Railroad may, by its advertisements, treat entire journey over its own and connecting lines as entire trip for which it alone would be responsible, 1050, note 25.

AGE—

Of deceased, when material under Lord Campbell's Act, 1397.

AGENT (See **STATION AGENT**; **SERVANT**)—

Delivery must be to carrier himself or proper agent, 105, 111.

Delivery to agent of carrier, when sufficient, 106, 107.

Delivery to carrier by agent of shipper, 108.

Delivery to agent of stage company, 111.

Whether steamboat company can be agent of distant railroad company, 111, note 22.

Delivery upon carrier's wharf, must be to duly authorized agent of carrier, 120.

[REFERENCES ARE TO SECTIONS.]

AGENT—con.

Power of agent of railroad or express company to accept goods at or away from designated place, 121.

Agent may refuse to accept at unusual place, 121.

Implied acceptance of goods by agent of carrier, 126.

Authority of agent to sign bills of lading, 159.

Implied powers of agents to make contracts for through carriage, 241.

Local freight agent may have such authority through usage, 241.

Carrier liable for incompetency of shipping agent under the Harter Act, 353, note 23.

Harter act requires "due diligence" both on part of vessel-owner and of his agent, 380.

Owner bound to limitation by acceptance of receipt by agent, 457.

Authority of carman to bind owner, 457.

Authority of drover to bind owner, 457.

Authority of drayman to bind owner, 457, note 9.

Contract not affected by secret limitations of agents' authority, 457, note 9.

Initial carrier, as agent of owner, has authority to accept reasonable terms of connecting carrier, 458.

But owner not bound by limitation where carrier has notice that authority of agent is restricted, 459.

Although he may adopt the act of his agent, 459.

Carrier is bound by such contracts made by his agent as public have a right to assume, from nature of employment, agent has authority to make, 460.

In England, local or station agent may bind carrier to performance of contract beyond scope of his legal duties, 461.

Public has right to assume that agent of carrier has authority to bind him within scope of his business, 462.

Station agent has implied power to make provision for clearance of customs duties, 462, note 19.

So he has implied power to agree to furnish reasonable number of cars for live stock by certain date, 462, note 19.

Or that person in charge of animals may ride in stock car, 462.

Verbal contract of shipment entered into by station agent will ordinarily bind carrier, 462, note 19.

Agent of each associated road has authority to bind other road, 462, note 19.

[REFERENCES ARE TO SECTIONS.]

AGENT—con.

Effect of circulars sent by carrier to shipper on authority of agent, 462, note 19.

Power of agent of carrier to agree that goods shall be sent by particular boat, 462.

Local usage, unknown to shipper, restricting power of carrier's agents, cannot affect his rights, 462.

In America, carrier's agent may agree to deliver beyond carrier's terminus, 462.

But agent cannot agree to forward freight by passenger train, 462.

Authority of agent to agree to furnish cars on given day, 630.

Authority of local and station agents, 630.

Delivery by carrier to unauthorized agent of consignee no excuse, 674.

How where goods are consigned to agent of carrier, 675.

In the absence of express authority agent of carrier cannot guarantee price of C. O. D. goods, 732.

Consignee cannot change destination when known to be mere agent, 736.

Notice of stoppage in transit may be given by agent of vendor, 759.

Not necessary that agent should have special authority to stop goods, 759.

General authority, or for purposes of consignment, sufficient, 759.

Authority of agent to waive requirement that freight charges shall be paid in advance must be shown, 799, note 12.

In passing upon right of carrier to freight *pro rata itineris*, acceptance of goods by agent of owner equivalent to acceptance by owner, 816.

Mere agent without interest cannot sue in tort, 1316.

AGGRAVATED INJURY—

Passenger cannot recover for injury which he himself aggravated, 1431.

AGISTERS—

Are not common carriers, 99.

AGREED VALUATION—

See LIMITATION OF CARRIER'S LIABILITY BY CONTRACT; COMMON CARRIER; VALUE OF GOODS; PARTIAL LOSS.

AISLE—

Liability of carrier for injuries to passenger from baskets or valises placed in aisle, 920.

[REFERENCES ARE TO SECTIONS.]

AISLE—con.

When negligence to give sleeping-car porter so many duties that he cannot keep aisle continuously in view, 1131, note 4.

Duty of sleeping-car company to keep aisle of car free from obstructions, 1144.

ALIENS—

Recovery by, under Lord Campbell's Act, 1395.

ALIGHT—

Carrier must give sufficient time to alight, 1118.

Carrier liable if passenger carried to next station through being given insufficient time to alight, 1118.

Carrier liable for negligent start of conveyance while passenger alighting, 1118.

Not necessary to prove particular servant of carrier who caused the injury, 1118.

Carrier must show injury occurred through getting off moving train instead of sudden start, 1118.

Question of what is a reasonable time one for the jury, 1118.

Carrier not liable where reasonable time and opportunity given, but passenger has delayed, 1119.

Those in charge of train must not give signal for starting, however, when delayed passengers alighting in their presence, 1119, note 14.

Not liable where passenger has evaded payment of fare, 1120.

Mere announcement of station not always equivalent to invitation to alight, 1123.

Passenger must be given opportunity to alight when carried past platform or station, 1126.

Alighting from moving train, when contributory negligence, 1126.

Assisting passengers to alight, 1127.

"ALL RAIL"—

Departure from contract to carry by, defeats exemption from liability, 480.

Contract to carry "all rail," carrier cannot carry by steamboat, 618.

AMBIGUITY (See CONSTRUCTION OF BILL OF LADING OR CONTRACT)—

In bill of lading, explainable by parol evidence, 167, 428.

Ambiguities in bill of lading solved against carrier, 464, 468.

AMOUNT—

If injury or loss occurs from cause for which carrier is not responsible, contract founded on adequate consideration limiting amount recoverable is valid, 425, 427.

[REFERENCES ARE TO SECTIONS.]

AMOUNT—con.

Amount must be fixed with regard to real value of goods, 425, 427, 428.

If loss occurs through carrier's negligence, owner may recover to full extent of actual loss, 425.

Measure of recovery where loss is only partial, 429.

Contracts limiting liability to fixed amount without regard to value of goods of no avail in case of negligence of carrier or his servants, 430.

Delivery after notice of stoppage in transitu, carrier liable for full value of goods and not for stated value, 432.

Same is true if carrier is guilty of a conversion, 432.

Carrier may stipulate in receipt that unless informed of value of goods he will be liable only to limited amount, 433, 434.

But carrier may waive requirement that, unless value of goods is stated, he will be liable only to limited amount, 435.

Amount of carrier's compensation may be fixed by statute, 804.

Or by agreement of parties, 804.

Or by usage, 804.

In absence of these, carrier will be entitled to a reasonable sum, 804.

Offer to carry freight for a certain rate may be withdrawn before acceptance, 804, note 30.

Inability of carrier to get cars before increased rate becomes operative through no fault of the carrier does not relieve shipper from reasonable increase, 804, note 30.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Owner may tender reasonable amount, and bring action against carrier refusing to accept goods, 805.

Consignee may tender reasonable amount and, if refused, bring action for goods, 805.

Or may pay charges and sue for excess over reasonable compensation, 805.

Actual tender in such case not necessary, 805.

When freight is to be paid by measurement, amount of freight is to be estimated by measurement at time of shipment, not delivery, 812.

Calculated on quantity shipped, carried and delivered, 813.

Carrier cannot be gainer by an increase of bulk or weight during voyage, 813.

[REFERENCES ARE TO SECTIONS.]

AMOUNT—con.

But may be loser by decrease, 813.

ANCHOR—

Whether concealed anchor an act of God, 275.

When storm parting anchors from chain is peril of the sea, 488, note 56.

ANIMALS (See LIVE ANIMALS)—

When leaving wounded animal near track is negligence in passenger carrier, 923.

Passenger carrier liable for negligence of engineer in failing to discover animal on track, 923.

Duty of railroad company to keep a sharp lookout for cattle or other animals upon track, 925, note 32.

Burden of proof in case of injury to, 1357.

ANNOUNCEMENT (See CALLING FLOORS; CALLING STATIONS)—

Of particular trains by carrier, 1111.

ANNOYANCE (See INCONVENIENCE)—

Passenger must not be subjected to unnecessary, in purchase of ticket, 1032.

When a proper element of damage, 1424.

APPLIANCES—*Of common carrier—*

Common carrier must provide himself with proper appliances for transportation, 494, *et seq.*

On unexpected influx of business, facilities should be equitably apportioned among shippers, 495.

Duty as to providing appliances for preventing the escape of sparks, 503.

Duty of common carrier to provide appliances for loading or unloading, 510.

Of passenger carrier—

Carrier responsible if he equips his vehicle with unsafe appliances, 911.

Injury to passenger from careless handling of vessel's appliances, 942.

APPORTIONMENT OF FREIGHT—

Where carrier entitled to apportionment of freight paid in advance for part performance, can only be compelled to refund part not earned, 830.

[REFERENCES ARE TO SECTIONS.]

APPORTIONMENT OF VEHICLES (See CARS; VEHICLES)—

On unexpected influx of business, vehicles should be equitably apportioned among shippers, 495.

Apportionment of coal cars under section three of Interstate Commerce Act, 557.

APPORTIONMENT OF WRONG—

Carrier cannot apportion or qualify his own wrong, 295.

APPROACHES TO AND EXITS FROM STATIONS AND PLATFORMS—

Carriers by railroad must provide reasonably safe means of getting to and from stations or trains, 937.

Carrier liable if it erects bridge giving access to its station and bridge falls, 937.

Or if it fails to plank bridge, place proper guard rails around it, or keep it in repair, 937.

Railroad liable where passenger is injured by being pushed from narrow passage way of boards to train, 937.

Railroad company only bound to provide one safe exit from trains, 937.

In absence of knowledge that only one route is provided, passenger may use other route which appears safe and designed for foot passengers, 937.

Whether passenger was justified in selecting particular route, or whether route was safe, are questions for the jury, 937.

If passengers adopt customary route with acquiescence of carrier, latter must take reasonable precautions to render such route safe, 937.

Immaterial in such case whether carrier furnished route, 937.

If passenger injured by accumulation of ice on customary route for egress from station, carrier liable, 937, note 29.

When carrier provides safe and commodious exit from train, passenger must use it, 937.

In such case carrier not liable if passenger leaves train and proceeds along track, 937, note 30.

Or goes off in darkness somewhere else, 937.

Or climbs over locked gate and goes in another direction, 937.

Or disregards safe route and goes by path where trucks are being unloaded from baggage car, 937, note 30.

Responsibility of railroad for accumulations of snow and ice on stairways of station, 937, note 33.

Sidewalk adjoining station must be kept in reasonably safe condition, 937.

[REFERENCES ARE TO SECTIONS.]

APPROACHES TO AND EXITS FROM STATIONS AND PLATFORMS—con.

If car does not reach platform, and passenger is invited to alight, reasonably safe way must be provided to platform, 937.

Negligence for freight train to block crossing or passage way to depot when passenger train is taking or discharging passengers, 937.

ARM—

Passenger projecting, from car window, chargeable with contributory negligence as a matter of law, 1209.

This view supported by weight of authority, 1209, 1210.

Extent of protrusion immaterial, 1209.

Passenger projecting, from car window, view that question of passenger's contributory negligence is for jury, 1211, 1212, 1213.

Passenger projecting, from car window no defense to carrier where it does not contribute to injury, 1214.

ARREST—

Conductor of train not required to inquire into cause of arrest and authority of officer when latter takes prisoner with him on train, 971.

Ordinarily carrier cannot interfere to protect passenger from arrest, 987.

Liability of carrier for wrongful arrest of passenger by carrier's servants, 1100.

ARSENIC—

Stowage of, 606, note 31.

ARTIFICIAL LIMB—

Aggravation of damages by, 1432.

"AS CUSTOMARY"—

In charter party, meaning of, 839.

"AS FAST AS STEAMER CAN DELIVER"—

Effect of clause in charter party to load or discharge as fast as steamer can deliver, 840.

Not tantamount to fixing certain definite number of days or hours, 840.

Such words not controlled by custom of port fixing rate of discharge at less amount than ship's full capacity, 840.

Charterers liable where only three out of four hatches used, 840, note 1.

Such a clause not affected by weather conditions, even if adverse, 840.

[REFERENCES ARE TO SECTIONS.]

"AS FAST AS STEAMER CAN DELIVER"—con.

Not complied with by providing wharf at which only one of several hatches can be used, 840.

Weather conditions in such a clause refer to weather at port of loading or discharge, and not elsewhere, 840.

ASPHALT—

Melting of asphalt not an inherent defect, 385, note 8.

ASSAULTS (See PROTECTION; SERVANTS)—

Carrier must protect passenger from, 980, *et seq.*

Assaults by third persons on persons coming to assist passengers, 991, note 23.

Assaults by carrier's servants on passenger, 1093, *et seq.*

Assaults on female passengers, see Female Passengers.

Assaults by passenger on carrier's servants, 1102.

When insulting language may be shown in mitigation of damages, 1102.

Liability of sleeping-car company for assaults by its servants on passengers, 1145.

Passenger going into baggage car, no excuse for unwarranted assault upon him by company's servant, 1200, note 3.

ASSENT—

What law question of assent of shipper to terms of bill of lading is governed by, 208.

When assent of shipper to terms of bill of lading is not binding, 404.

Shipper presumed by accepting receipt to have assented to its conditions, 408, 409.

Some courts, however, hold mere acceptance insufficient, 410.

Rule in Illinois, 410.

Parol evidence admissible on question of shipper's assent to valuation of goods, 428.

Mere knowledge of defect in vehicle does not amount to assent by shipper, 497, note 15.

Assent by passenger to conditions on ticket, 1070.

ASSIGNMENT—

Of bills of lading, effect of, 175, *et seq.*

Of bill of lading vests in consignee the right to choose the wharf, 698, note 6.

Right of stoppage *in transitu* defeated by assignment of bill of lading, when, 762.

Assignment of "spent" bill of lading, 777, note 49.

[REFERENCES ARE TO SECTIONS.]

ASSIGNMENT—con.

Effect of assignment of bill of lading on consignee's liability for freight, 808.

Effect on rights of master at wharf, 853, note 56.

Lien of carrier not assignable, 888.

ASSIGNMENT FOR BENEFIT OF CREDITORS—

Carrier's lien not lost where delivery made to one to whom consignee has made an assignment for the benefit of his creditors, 869.

Lien in such case follows the fund realized on the property delivered, 869.

ASSISTANCE BY CARRIER—

Assisting passenger to board train, 1112.

Assisting passenger to alight, 1127.

ASSISTANTS OF PASSENGERS—

Person coming to station to assist passengers, though not a passenger, is not a trespasser, 991.

Carrier owes him at least ordinary care to see he is not injured by defective station facilities or approaches thereto, 991.

So if carried off by moving train conductor cannot force him off while train moving at dangerous speed or lock the door in his face and leave him in dangerous position on platform, 991, note 22.

Carrier should hold train a reasonable time for him to render needed assistance and leave the train, 991.

Carrier liable if person rendering assistance is injured by sudden starting of train or omission to give customary signals, 991.

Liability of carrier to persons coming to assist passengers for injuries due to truck being struck by passing car, 991, note 23.

For injuries due to mail bag thrown from car, 991, note 23.

For injuries due to unsafe condition of station approach, 991, note 23.

For injuries due to brakeman on passing car swinging his body out and striking plaintiff, 991, note 23.

For injuries due to improper lighting of platform, 991, note 23.

For injuries due to assaults by third persons, 991, note 23.

Where no necessity to go upon the train, carrier only owes him duty of ordinary care, 991, note 24.

Carrier not liable if person accompanying passenger goes from car to car, and conductor fails to hold train until he alights, 991, note 24.

[REFERENCES ARE TO SECTIONS.]

ASSISTANTS OF PASSENGERS—con.

Carrier not liable if person accompanying passenger attempts to leave the train while in motion and is injured, 991, note 24.

Carrier should be notified of such person's presence on the train, 991.

What sufficient to put carrier on notice of such person's presence and intentions on train, 991, note 25.

ASSOCIATED RAILWAYS—

Liability of, for loss of baggage, 255.

ASSOCIATION—

Between carriers, when deemed partnership, 249-264.

Liability of each carrier in case of, 249-264.

ASSUMED NAME—

Purchase of non-transferable ticket under, 1056, note 60.

ASSUMPSIT—(See FORMS OF ACTION)—

In actions against carriers of goods, same law governs whether the form of action is assumpsit or tort, 204.

Gratuitous passenger cannot recover in, for loss of baggage, 1332.

ASSUMPTION OF RISK—

Effect of passenger knowingly accepting passage over a new road not yet open for traffic, 900, note 25.

Effect of passenger voluntarily leaving a place of safety on boat, 890, note 1.

ATMOSPHERIC CONDITIONS—

When atmospheric conditions rendering telegraph wires unavailable will be excuse for delay, 654.

ATTACHMENT—

Effect of seizure of goods while in hands of carrier under an attachment writ, 738-740.

Attachment will not excuse non-delivery where the goods are not taken out of carrier's possession and writ is afterwards dismissed, 741, note 20.

Right of stoppage *in transitu* not defeated by attachment of creditors of consignee, 763.

Effect of attachment of goods by vendor on his right of stoppage *in transitu*, 764.

AUCTION—

Demurrage through custom to sell fruit at auction, 839.

[REFERENCES ARE TO SECTIONS.]

AUDITOR—

When testimony of railroad company's auditor is competent as to whether person was a passenger and his ticket had been taken up by certain conductor, 1001, note 11.

AUTHORITY (See AGENT; STATION AGENT)—

Sale of goods by carrier without authority, not entitled to compensation, 817.

Or by person assuming to act for owner, but without authority, 817.

AVOIDABLE CONSEQUENCES—

Carrier liable, notwithstanding passenger's contributory negligence, if after becoming aware of passenger's exposed position, he fails to exercise reasonable care to avert injury, 1173.

AXLE—

Liability of passenger carrier for latent defect in axle of vehicle, 903, 904, note 3.

When defect in axle attributable to fault of manufacturer, 906.

BAD CHARACTER—

Passenger may refuse to accept persons of, 966.

But person of, cannot be ejected if properly conducting himself, 975.

BAGGAGE—

Delivery of baggage to steamship company on representation of agent that it will be placed in stateroom when received, 72, note 60.

Passenger carrier common carrier as to passenger's baggage, 93, 1241.

Delivery to person whom passenger sees handling baggage, 106, note 10.

No delivery where owner retains custody of baggage, 109.

Driver of coach may receive passenger's baggage anywhere on route, 111.

Carrier liable only as warehouseman when baggage delivered, but not for immediate transportation, 112, note 23.

Place of delivery of baggage to common carrier may be fixed by usage, 116.

Usage to receive baggage in certain mode will not always justify delivery of freight in same manner, 117.

Leaving baggage on pier without directions will not give maritime lien on vessel for its loss, 120.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

Custom of checking has no effect upon character of delivery to carrier, 127.

Baggage, held only as ordinary freight where delivered to carrier without giving notice of intention to become passenger, 127.

Placing baggage in common baggage room not delivery to connecting carrier, 131, note 13.

Liability of associated railways for lost baggage, 255.

Liability of connecting stage-coaches for lost baggage, 260, 261.

Carrying money in trunk without disclosing value to carrier, 332. Sec. 4181, U. S. Rev. Statutes, does not apply to passenger's baggage, 344, note.

Damages for loss of baggage not within provisions of Harter Act, 347.

In America, liability of carrier for loss of baggage cannot be limited by public notice, 399.

Passenger's rights and carrier's liability as to baggage are fixed when his ticket is bought, 417, note 21.

Carriage of baggage at owner's risk, in Canada, 452, note 25.

A vessel may be unseaworthy as to a passenger's baggage, 497, note 11.

Passenger carrier, insurer of safety of, against every accident not act of God or of public enemy or fault of passenger himself, 1241.

Rule formerly otherwise, 1241.

Contract to carry baggage incidental to contract to carry passenger, 1241.

Passenger carrier, by contract to carry passenger, undertakes, also, to carry his reasonable and ordinary baggage, 1241.

Passenger carrier may charge such rate for passage as will compensate him for responsibility assumed for safety of baggage, 1241, note 3.

What is baggage, 1242.

Difficulty of framing definition of, 1242.

Usually those articles of personal convenience or necessity which passenger takes with him, either for his immediate use or for ultimate purpose of journey, 1242, 1244.

Baggage not limited to articles to be used on journey, 1253.

Baggage may consist of articles appropriate or essential to purpose of journey, 1254.

Is whatever is usually carried as baggage, 1243.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

Rule not confined to wearing apparel, brushes, razors, writing apparatus and the like, 1243.

What should constitute baggage will depend very much on circumstances of each particular case, 1243, note 8.

As to value, 1245.

General law prescribes no fixed limit as to value beyond which carrier not liable, 1245.

But carrier not liable for articles of greater value than those which passengers, under like circumstances, and in like conditions in life, usually carry, 1245.

Valuable laces, when baggage, 1245, 1246.

Wearing apparel, usually baggage, 1244, 1246, 1253.

Gun-case, when baggage, 1244.

Fishing apparatus, when baggage, 1244, 1254.

Easel, when baggage, 1244, 1254.

Books, when baggage, 1244, 1246, 1254.

Money, when baggage, 1246.

Tools, when baggage, 1246, 1253.

Manuscript music, when baggage, 1246.

Surgical instruments, when baggage, 1246.

Jewelry, when baggage, 1246.

Watch, when baggage, 1246.

Pistol, when baggage, 1246.

Opera glasses, when baggage, 1246.

Camera, when baggage, 1246.

Savings bank, when baggage, 1246.

Puff boxes, when baggage, 1246.

Cloak, when baggage, 1246.

Servant's livery, when baggage, 1246.

Underclothing, of husband, carried by wife in her trunk, held baggage, 1246.

Cloth, not yet made into garments, held baggage, 1246, note 25.

Revolvers, held baggage, 1246.

Gun, held baggage, 1254.

Rifle, when baggage, 1246, note 26.

Rings, when baggage, 1246, note 26.

Dressing-case, when baggage, 1246, note 27.

Bedding, when baggage, 1247.

A broad rule as to what is baggage, 1248.

What is not baggage, 1249.

Articles intended for use in business, not baggage, 1244.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

- Furniture, not baggage, 1244.
- Household goods, not baggage, 1244, 1249.
- Deeds and documents carried by an attorney, not baggage, 1245, note 10.
- Merchandise intended for sale, not baggage, 1249.
- Sheets of paper, when held not to be baggage, 1249.
- Money, when held not to be baggage, 1249.
- Jewelry, when held not to be baggage, 1249.
- Regalia, not baggage, 1249.
- Engravings, not baggage, 1249.
- Muff, when held not to be baggage, 1249.
- Napkin rings, not baggage, 1249.
- Silverware, not baggage, 1249.
- Nails, not baggage, 1249.
- Groceries, not baggage, 1249.
- Fruit, not baggage, 1249.
- Masquerade costumes, not baggage, 1249.
- Stage properties, not baggage, 1249.
- Feather bed, when not baggage, 1249.
- Books, when not baggage, 1249, note 5.
- Bicycle, not baggage, 1249, note 15.
- Articles not properly baggage, carrier liable as insurer for, if he accepts them as baggage with knowledge of their true character, 1250.
- Articles not properly baggage, when carrier will be presumed to have knowledge of true character of, 1250.
- Closed package, mere external appearance of, not sufficient to charge carrier with knowledge of its contents, 1250.
- Closed package, carrier not required to make inquiry as to contents of, 1250.
- Trunk, paying for extra weight of, not sufficient to charge carrier with knowledge of its contents, 1250, note 19.
- Trunk or closed package, knowledge by carrier of contents of, may be inferred from general custom or manner of doing business, 1250.
- Trunks of commercial travelers, when carrier will be charged with knowledge of their contents, 1250.
- Dog, carrier liable for loss of, if accepted by baggage master for carriage, 1250, note 16.
- Dog, acceptance of, by baggage-master in violation of rule of company, no excuse if passenger without knowledge of rule, 1250, note 16.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

- Baggage-master has authority to accept merchandise as baggage when he knows its true character, 1251.
- Baggage-master, knowledge gained by, that valise contains merchandise, not binding on carrier where such knowledge is obtained before valise is accepted for transportation, 1251.
- Regulation prohibiting baggage-master from accepting merchandise as baggage, when passenger bound by, 1251.
- Merchandise, Massachusetts rule as to, 1252.
- Baggage, what is, question of law when facts not disputed, 1255.
- Baggage, what is, question for jury when there is some uncertainty or dispute as to facts, 1255.
- Baggage-master, implied authority of, concerning baggage, 1256.
- Baggage-master has no implied authority to contract for carriage of baggage beyond terminus of his employer's route, 1256, note 35.
- Baggage-master has implied authority to accept baggage for a reasonable time before train departs, or before ticket is purchased, 1256.
- Carrier not liable for baggage, as common carrier, unless absolute possession and control be given to him, 1257, 1260, 1261, 1262.
- This rule does not apply where passenger retains partial control for purposes of journey, 1258, 1259.
- But carrier not liable where baggage lost through negligence of the passenger, 1260.
- English cases; must be clear that passenger assumes entire control, 1258.
- English cases; question of delivery to the carrier, 1259.
- American cases; carrier liable only for negligence where baggage retained in custody of passenger, 1264.
- American cases; failure of passenger to exercise reasonable care for baggage will preclude him from right to recover, 1264.
- Money, negligently left by passenger on window sill of car, carrier not liable for its loss by theft, 1264, note 13.
- Wearing apparel, carrier not liable for loss of, if in present use, 1265.
- Sleeping-car, baggage retained by passenger on, carrier liable as insurer of, 1266.
- Hand-bag, dropped out of car window, liability of carrier for, 1267.
- Carrier by water, liability of, for baggage taken by passenger into his stateroom, 1268.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

- Carrier by water, not liable for clothing, money or jewelry in custody of passenger, 1269.
- Carrier by water, not liable for watch worn by passenger, 1269.
- Carrier by water, not liable for money stolen from passenger while asleep in his berth, 1270.
- Carrier by water, not liable for theft of trunk of steerage passenger tied to his berth, 1270.
- Carrier by water, under New York rule, liable as innkeeper for baggage kept by passenger in his stateroom, 1271.
- Carrier by water, under New York rule, liable for money carried by passenger as traveling expenses which is stolen from his stateroom, 1271, note 26.
- Carrier by water, liable for loss of watch, chain and pocket-book carried by passenger in his stateroom, unless due to negligence or fraud of passenger, or to act of God or public enemy, 1271, note 31.
- Carrier by water, liable for baggage seized by officer of boat and thrown into sea, 1171, note 31.
- Carrier by water, not liable for loss of baggage, which is attributable to passenger's negligence, 1272.
- Not negligence for passenger to place his watch and railroad ticket under his pillow in berth of steamer, 1272, note 1.
- Sleeping-car companies, liable neither as common carriers nor as innkeepers for safety of baggage, 1130, 1273.
- Parlor-car companies, liable neither as common carriers nor as innkeepers for safety of baggage, 1130, 1273.
- Sleeping and parlor-car companies, liable for loss of baggage only where they have failed to use reasonable care, 1131, 1273.
- Mere fact that baggage is lost from sleeping-car raises no presumption of negligence, 1131, 1132.
- But burden on sleeping-car company, where baggage is lost while passenger asleep, to show that it exercised reasonable care, 1131.
- Duty of servants in charge of sleeping-car to keep reasonable and continuous watch over passenger's baggage while passenger asleep, 1131.
- Baggage purloined by servants of sleeping-car company, company liable, 1131.
- But liability of sleeping-car company is limited to such articles as are properly included in term baggage, 1132, 1273.
- Sleeping-car company not liable where loss attributable to negligence of passenger, 1132.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

Pocket-book left in sleeping-car, 1132, note 8.

Satchel, negligently left by passenger near open car window, 1132, note 8.

Ring, not negligence in passenger to place in pocket-book while asleep, 1132, note 8.

Money, placed by passenger under pillow while asleep, 1132, note 9.

Umbrella, intrusted to care of porter, 1132, note 9.

Limitation of liability by sleeping-car companies, 1132.

Liability of sleeping-car company while passenger away from berth, 1133.

Rules of liability applicable to sleeping-car companies apply also to parlor-car companies, 1134.

Railroad company liable as common carrier to passenger in sleeping-car, 1135, 1273.

But railroad company is liable only for reasonable baggage, 1135.

Railroad company cannot limit its common law liability for negligence by any arrangement with sleeping-car company, 1135.

Liability of sleeping-car company for baggage in custody of porter while lady passenger is leaving train, 1146.

Property not baggage unless owner a passenger, 1274.

Property accepted by carrier with knowledge that owner is not to be a passenger, carrier liable for, as freight, 1274.

How far carrier accepting property as baggage liable when owner does not become passenger, 1275.

Liability only that of a gratuitous bailee, 1275.

Where baggage is accompanied by a person other than the owner, 1276.

Property not owned by passenger, carrier not liable to owner for loss of, unless guilty of negligence, 1276.

Property not owned by passenger, and not properly a part of passenger's baggage, carrier not liable to owner for loss of, unless guilty of fraud or gross negligence, 1276.

Property not owned by passenger, which is properly a part of passenger's baggage, owner may recover in tort where it is lost or injured through carrier's negligence, 1276.

Husband may recover for loss of wearing apparel of wife, 1276, note 11.

Husband, traveling with wife, on tickets purchased by him, may recover in *assumpsit* for loss of wife's baggage, 1277.

Father, traveling with infant child, may recover in *assumpsit* for loss of articles purchased for use by child, 1277.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

Merchandise, not owned by passenger, carrier not liable to owner for loss of, if accepted without knowledge of its true character, unless guilty of gross negligence, 1276.

Merchandise, not owned by passenger, carrier liable to owner for loss of, if accepted with knowledge of its true character, 1276.

When passenger need not accompany his baggage, 1278.

Passenger need not accompany his baggage where omission to do so is due to fault of carrier, 1278.

Or where carrier agrees to forward the baggage by another train than that on which passenger travels, 1278.

Freight, baggage when carried as, 1279.

Baggage left behind by passenger, subsequent transportation of, by carrier, renders him liable for it as freight, 1279.

Passenger may lie over upon route and permit baggage to proceed, 1280.

Where carrier agrees that passenger may lie over, and that baggage shall proceed, he thereby assumes the liability of a common carrier, 1280.

But if passenger lie over without consent of carrier, liability is only that of a gratuitous bailee, 1280.

Delivery of baggage to carrier, 1281.

When carrier's liability, as such, for safety of baggage begins, 1281.

Question will frequently depend on carrier's manner of doing business at particular station, 1281.

Authorized agent, baggage must be accepted by, to impose on carrier liability of an insurer, 1281.

Mere placing of trunk at entrance to baggage-room not sufficient to constitute a delivery to carrier, 1281.

Mere placing of baggage on wheeled truck on station platform, not sufficient to constitute a delivery to carrier, 1281.

Regulation that baggage shall not be checked until ticket purchased is reasonable, 1281, note 25. See, also, 1077, note 17.

Regulation that baggage shall not be received into baggage-room until ticket purchased is unreasonable, 1281, note 25. See, also, 1077, note 17.

Regulation that baggage shall not be checked until half hour before train time, whether reasonable, will be a question for jury, 1281, note 25.

Dogs, regulation excluding from passenger cars reasonable, 1077, note 17.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

- Packages too large to be carried in lap, regulation that passengers with, shall pay extra fare, reasonable, 1077, note 17.
- Packages of merchandise, regulation that passengers with shall not be admitted to cars, reasonable, 1077, note 17.
- Delivery of baggage to wrong connecting carrier, liability of preceding carrier for, 1282.
- Delivery of baggage to wrong connecting carrier, liability of connecting carrier, 1283.
- Delivery of baggage at destination, 1284.
- Passenger allowed reasonable time to call for baggage, 1285.
- During such reasonable time, liability of carrier, as such, continues, 1285.
- Reasonable time as to delivery of baggage not the same as that allowed owner of goods to remove same, 1285.
- Reasonable time, is less than reasonable time for removal of freight, 1285, 1286.
- Reasonable time, what is, 1286.
- Reasonable time, usually such time as will be reasonably necessary, considering opportunities afforded for removal, for passenger to present check and take baggage into his custody, 1286.
- Whether removal must be on day of arrival, 1284, 1286, 1287.
- If passenger arrive at destination in nighttime, he cannot delay removal of baggage during remainder of night, 1286, 1288.
- Reasonable time, what is, usually a mixed question of fact and law, 1285, note 5.
- Reasonable time, dissent from prevailing construction of, 1290.
- Liability, carrier not released from, by failure of passenger to call for baggage, 1291.
- In such case he becomes liable as a warehouseman, 1291.
- Warehouseman, liability of, in such case, implied from contract to carry, 1292.
- When through contract to carry passenger to destination, initial carrier liable for loss of baggage in hands of subsidiary carrier holding as warehouseman, 1292.
- Trunk, where delivered to passenger, and same is immediately re-delivered to carrier's station agent for temporary keeping, carrier no longer liable in any capacity, 1291, note 15.
- Baggage-room, must be maintained in reasonably safe condition, 1291, note 15.
- Baggage-room, whether kept reasonably safe, held question for jury, 1291, note 15.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

Strict liability preserved where it is not usual custom for carrier to immediately deliver baggage, 1293.

Or where delay in removal is occasioned by carrier, 1293.

Fact that trunk arrives on later train than that conveying passenger, held evidence of negligence, 1294, note 17.

Delivery of baggage at destination to transfer company, when liability of carrier will terminate, 1294.

Delivery of baggage by transfer company, when such company's liability as an insurer will terminate, 1294.

Delivery, passenger has right to demand and receive his baggage at any regular stopping place, 1295.

But mere privilege to stop off over night at an intermediate station will impose no duty on carrier to unload and reload baggage, 1295.

Through contract as to passenger, through contract as to his baggage, 1296.

What constitutes through contract as to passenger is, in most respects, same as that required to constitute through contract as to goods, 1296 (See, ch. IV).

Parties may contract as to baggage as with reference to ordinary goods, 1296.

Although through contract as to baggage, any subsequent carrier, through whose fault loss occurs, may be held liable, 1296.

Contracts limiting liability as to baggage, 1297.

In general, no distinction between contracts affecting baggage and those affecting goods, 1297.

Limitation, terms of, on baggage checks, 1298.

Limitation, terms of, distinction between those on baggage checks and those in shipping contracts, 1298.

Limitation, terms of, on baggage checks, usually not binding on passenger unless assented to, 1298.

Limitation, terms of, on passenger tickets, 1299.

Limitation, terms of, on passenger tickets, binding on passenger if ticket imports special contract, 1299. See, also, 1069.

But to be binding on passenger, such terms must properly form a part of contract embodied in ticket, 1299.

Limitation, terms of, on passenger ticket, not importing special contract, not binding on passenger unless assented to by him, 1299.

Limitation, terms of, on passenger ticket, no evidence in carrier's

[REFERENCES ARE TO SECTIONS.]

BAGGAGE—con.

favor of a special contract when written or printed on back of ticket, 1299. See, also, 1070.

Limitation, terms of, on passenger ticket, not binding on passenger when misled by statements of carrier's agent, 1299, note 14. See, also, 1070.

Limitation, terms of, on passenger ticket, to avail carrier, must be printed in language which passenger understands, 1299, note 14.

Limitation, terms of, on passenger ticket, to avail carrier, must not be obscurely printed on ticket, 1299, note 14. See, also, 1070.

Limitation, terms of, on passenger ticket as to amount of baggage, valid when reasonable, 1299, note 14.

Limitation, terms of, on passenger ticket as to amount of baggage, not applicable to baggage upon which excess charges have been paid, 1299, note 14.

Free-pass, terms of limitation in, relieving carrier from all liability for loss of baggage, held not unreasonable, 1299, note 14.

Free baggage, amount of, regulated by section twenty-two of Interstate Commerce Act, 523.

Gratuitous passenger, liability of carrier for baggage of, 1300.

Liable only as a gratuitous bailee, 1300.

Gratuitous passenger, burden of proof on, to show baggage lost through gross negligence, 1300.

Gratuitous passenger, cannot recover in action of *assumpsit* for loss of baggage, 1332.

Lien on baggage, carrier has, to secure price of carriage, 1303.

Wearing apparel on person of passenger, carrier has no lien on to secure price of carriage, 1303.

Carrier has no right to forcibly take articles from possession of passenger to secure price of carriage, 1303.

Carrier has no right to detain passenger to compel payment of fare, 1302.

Damages for loss of baggage, see cases cited in 1363, note 8.

BAGGAGE CAR—

In absence of custom, carrier need not provide entrance to train by baggage car, 927.

Requiring dogs to be carried in, 1077, note 17.

Use of, for passengers, 1115.

Riding in, voluntarily and unnecessarily will be contributory negligence, 1200.

Riding in, by direction of company's authorized agent; not contributory negligence, as a matter of law, 1200.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE CAR—con.

- Going into, to consult conductor on legitimate business, not contributory negligence as a matter of law, 1200, note 1.
- Riding in, no bar to recovery where it in no manner contributes to injury, 1200.
- Going into, to better escape impending peril, question of passenger's contributory negligence, one of fact for jury, 1200, note 3.
- Going into, no defense for unwarranted assault by company's servants, 1200, note 3.
- Passenger riding in, according to his habit, with knowledge of conductor, not guilty of contributory negligence, 1200.
- Postal clerk, off duty, riding in, according to custom, not *per se* negligent, 1200, note 4.
- Riding in, against rules of company, held not contributory negligence where conductor has knowledge of passenger's presence in car and makes no effort to remove him, 1200.
- Better rule is that such conduct will bar passenger's right to a recovery if he is thereby injured, 1200.
- Person collusively agreeing with baggage-master to ride in, cannot recover of company for being forced from car by baggage-master while train in motion, 1200.
- Rule of company against riding in, company may waive benefit of such rule, 1200.
- Passenger voluntarily entering train through, chargeable with contributory negligence, 1188.

BAGGAGE CHECKS—

- Now in universal use, 1301.
- Prima facie* evidence only that carrier has received baggage, 1301.
- But notwithstanding baggage check, carrier may show that baggage was never delivered to him, 1301.
- Do not identify baggage further than numbers on check, 1301.
- Carrier entitled to demand presentation of check when baggage called for, 1301.
- But if passenger unable to present check, carrier cannot unreasonably refuse to deliver baggage to him, 1301.
- What a baggage check implies, 1302.
- Are mere tokens to evidence receipt of baggage, 1302.
- Do not import contracts, 1302.
- But may be looked to, in connection with ticket, to determine contract rights of passenger, 1302.
- Through check, without through ticket or other contract, will not render initial carrier liable for loss of baggage on subsidiary line, 1302.

[REFERENCES ARE TO SECTIONS.]

BAGGAGE CHECKS—con.

Limitation, terms of, on baggage checks, 415.

Such terms not binding on passenger unless assented to by him, 1298.

BAGGAGE-MASTER—

Invitation of, to enter baggage room is invitation of carrier, 932.

Careless handling of trucks by, 935, note 6.

Tripping over foot of, 935. "

Assault by baggage-master on female passenger, 1101.

Has authority to accept merchandise as baggage where he knows its true character, 1251.

Regulation prohibiting baggage-master from accepting merchandise as baggage, when passenger bound by, 1251.

Implied authority, concerning baggage, 1256.

No implied authority to contract for carriage of baggage beyond terminus of his employer's route, 1256, note 35.

Has implied authority to accept baggage for a reasonable time before train departs, 1256.

Dog, carrier liable for, if accepted by, 1250, note 16.

Dog, acceptance of, by baggage-master in violation of rule of company, no excuse if passenger without knowledge of rule, 1250, note 16.

BAGGAGE-ROOMS—

Not private rooms as against owners of baggage who are permitted to enter, 932.

Entering baggage-room against express regulation of carrier, or without permission, 932.

Regulation against receiving baggage into, before ticket procured, 1077, note 18.

Must be maintained in reasonably safe condition, 1291, note 15.

Whether kept reasonably safe, held question for jury, 1291, note 15.

Regulation that baggage shall not be received into, until ticket purchased, is unreasonable, 1281, note 5. See, also, 1077, note 17.

BAGGAGE-WAGON—

Person riding on, not a passenger, 1000.

BAILMENT—

What is a, 1.

Classification of bailments, 2.

Carriage of goods either mandate, or hiring, 3.

[REFERENCES ARE TO SECTIONS.]

BAILMENT—con.

Extraordinary responsibilities of common or public carriers have no application to ordinary bailments, 3, 9.

Distinction between liability of common carriers and that of other bailees, 4.

Degree of diligence required depends on circumstances, 6.

Gratuitous bailee liable for gross negligence only, 7.

But slight diligence required where bailment for benefit of bailee alone, 8.

Ordinary diligence required where bailment beneficial to both parties, 8.

Liability of bailee for negligence, 6.

Comparative degrees of diligence and negligence, 10.

Utility of this classification, 11.

Liability for malfeasance or fraud, 14.

BALANCE—

No right in carrier to retain goods for general balance in absence of contract or usage justifying, 865.

But the rule is otherwise when the same vendor, under a single contract of sale, ships several consignments of goods to the same vendee, each shipment embracing several carloads, 865, note 16.

And carriers may by express agreement or long established usage of particular localities, or of particular classes of those engaged in that business, retain goods for general balances, 865.

Carrier cannot hold goods, where consigned generally to consignee, for general freight balance against consignor, 866, note 18.

Lien for general balance, good as between carrier and consignee, cannot prevail against vendor's right of stoppage, 872.

BANANA SKIN—

Leaving banana skin on station platform, 935.

BANK—

Delivery by express company of packages to bank after banking hours, 719.

BANK OF RIVER OR LAKE—

Whether washing away bank is act of God, 274.

BANK BILLS (See MONEY)—

Usage to carry bank bills must be shown in order to make carrier of goods or passengers liable, 86.

Right of carrier to subrogation of general owner's rights against bank when agent of carrier destroys bank bills, 781.

[REFERENCES ARE TO SECTIONS.]

BARGEMEN—

When common carriers, 65.

Duty as to fitness of vessel, 497.

BARRATRY—

What is meant by, in contract limiting liability, 468, 469.

“BASING POINT SYSTEM”—

Is not illegal under section four of Interstate Commerce Act, 571.

BASKETS—

Injuries to passenger from baskets in aisle, 920.

BEAM—

Injury to passenger from, while boat discharging lumber, 890,
note 1.

BEANS—

Duty of carrier when beans become wet during transportation,
632.

“BEATS”—

Duty of carrier to, 1001.

BEDDING—

When baggage, 1247.

BEDDING FOR LIVE STOCK—

Liability of connecting carrier for defective bedding, 500.

When carrier of live stock liable for defective bedding, 509, note
46.

BELT LINE—

When a common carrier, 76, note 72.

When not a connecting carrier, 247.

When subject to Interstate Commerce Act, 526, note 9.

BENCH—

Placed too far away from car steps, negligence for passenger to
attempt to alight by means of, 1190.

Defective benches in waiting-rooms, 931.

Prohibiting passengers from lying on benches in waiting-rooms,
943.

BENEFICIARY—

Contributory negligence of, effect of, on action for wrongfully
causing death of deceased, 1392.

BERTH—

Liability of passenger carrier for defective, 911.

Duty to supply proper berths in sleeping-car, 922, 1139.

[REFERENCES ARE TO SECTIONS.]

BERTH—con.

Care due by sleeping-car company when passenger away from berth, 1133.

Right of passenger to berth subject to reasonable rules and regulations of company, 1139.

Duty to furnish means for getting into or out of berth, 1140.

Passenger entitled to occupy only the berth he pays for, 1141.

Duty of carrier by water to furnish berths, 1165.

BERTH FOR VESSEL—

Vessel required to make delivery within such parts of the port as have become fixed by established usage, if berth can be obtained there within reasonable time, 698, note 4.

Delay through waiting for berth not “a cause or accident beyond the control of consignees,” 833, note 47.

Under agreement for quick dispatch, charterers take upon themselves the risk of at once providing a berth, 839.

When vessel to proceed to berth “as ordered,” charterer given option in choice of berth, 850.

If strike prevents going to certain berth, charterers not liable for delay in ordering to another berth, 850.

Nor will charterers be liable for delay due to crowded condition of dock, 850.

Master may refuse to go to unsafe designated berth, and hold consignee for the delay, 850.

But demurrage not allowable where vessel cannot reach designated berth on account of overloading, 850.

BETTERMENTS—

When considered in determining the reasonableness of rates, 583, note 37.

BICYCLE—

Not baggage, 1249, note 15.

BILGES—

When an accumulation of water in the bilges is a fault in the “management” of a vessel, 382, note 1.

BILL OF EXCHANGE—

Carrier taking bill of exchange from consignee, discharges consignor, 810.

BILL OF LADING—

What is, 154.

Written contract not necessary to make carrier liable, 152.

[REFERENCES ARE TO SECTIONS.]

BILL OF LADING—con.

Bill of lading must be signed by carrier or authorized agent and accepted by shipper, 154.

Ship's bill of lading usually made out in triplicate, 155.

Copy delivered to shipper best evidence of contract, 155.

Variance between charter party and bill of lading, 156.

Bills of lading are both receipts and contracts to carry, 157.

As receipt, only *prima facie* evidence, 158.

Parol evidence admissible to vary or explain bill of lading as receipt, 158.

Authority of agent to sign bills of lading, 159.

Liability of carrier when goods not received, but receipt given, 160.

Whether false bill of lading issued by proper agent of carrier good in hands of innocent party, 161.

The contrary view, 162.

Recitals as to condition of goods, how far conclusive, 163.

Effect of recitals as to amount or quantity of goods received, 164.

Effect of clause that deficiency in cargo shall be paid for by carrier, 164.

Effect of clause that weight, contents, or value of goods are unknown, 165.

Parol evidence inadmissible to vary terms of contract contained in bill of lading, 167.

But ambiguity may be removed by parol evidence, 167.

Implied obligations cannot be varied by parol, 168, 169.

Effect of subsequent parol agreement, 170.

Effect of delivery of bill of lading after oral contract of shipment made but before shipment has begun, 171.

How when goods shipped under parol contract before bill of lading delivered, 172.

Effect of custom, 173.

Temporary receipts, 173.

Acceptance of bill of lading after oral agreement made to furnish cars at certain time, 174.

Prior agreement as to rate of demurrage not changed by delivery of bill of lading stipulating for different rate by mistake, 832.

Assignable but not negotiable.

Bill of lading *quasi-negotiable* only, 175.

When properly indorsed and delivered symbolic delivery of goods, 175.

[REFERENCES ARE TO SECTIONS.]

BILL OF LADING—*Assignable but not negotiable*—con.

When indorsement and delivery procured by fraud, no title passes even to *bona fide* holder, 175.

Statutes making them negotiable, 176.

Delivery in accordance with bill of lading or its indorsements.

Consignee must be treated by carrier as absolute owner unless he has notice to contrary, 177.

Party claiming goods must produce properly indorsed bill of lading, 177.

Great care should be exercised by carriers in delivering to proper parties, 177.

No excuse for delivery to wrong party except fault of shipper, 177, 668, *et seq.*

Delivery must be only in accordance with bill of lading, 177.

If person claiming goods fails to present proper bill of lading, carrier must base refusal to deliver on that ground, 178.

Carrier must respect transfers of bill, 179.

Must ascertain if one was issued, 180.

Where bill of lading not presented, carrier protected if delivery is made to proper party, 181.

Effect of provision in bill of lading requiring its surrender or production before delivery, 181.

Effect of transfer of bill of lading after delivery of goods, 182.

Bill of lading to shipper's order—Draft attached, 183.

Pledge of bill of lading to shipper's order to secure advances—Draft attached, 184.

Pledge of bill of lading to shipper's order—Time draft attached, 185.

Effect of directions to notify certain person, 187.

Possession of unindorsed duplicate, 188.

Duplicate obtained by fraud, 189.

Goods delivered only on surrender of duplicate, 190.

Protection of third person paying draft for consignee's accommodation, 191.

Effect of custom on delivery without surrender of bill of lading, 192.

Who may sue for breach of contract, 197, 198.

Statutes affecting, 198.

Surrender of, 181, 192, 777.

When consignment may be changed by shipper.

When delivery to carrier is not delivery to consignee, shipper may, after bill of lading executed, direct delivery to another consignee, 193, 660.

[REFERENCES ARE TO SECTIONS.]

BILL OF LADING—*When consignment may be changed by shipper*—con.

But not where first bill of lading has been forwarded to first consignee, 193.

Carrier cannot give second receipt till first and all duplicates returned, 193.

When delivery to carrier equivalent to delivery to consignee, carrier holds as agent of latter, and destination cannot be changed without his consent, 194.

When consignee is vendee or has made advances on goods, title vests in him on delivery to carrier, 194, 195.

Delivery to different persons may be justified by previous course of dealing, 196.

By what law validity and effect of contract determined.

See § 199-224 and Conflict of Laws.

Under Harter Act.

Stipulations in bill of lading contrary to section one of Harter Act are void, 349.

Exemption clauses in bills of lading strictly construed, 365.

BILLING—

Penalties for false billing under section 10 of Interstate Commerce Act, 523.

BLANKS—

Effect of blanks in bill of lading, 177, note 35.

Effect of failure to fill demurrage blanks in charter party, 842, note 15.

BLINDNESS—

Unfits person for travel ordinarily, unless accompanied, 967.

Agent should listen to explanation as to fitness to travel alone, 967.

Carrier should exercise greater vigilance toward blind and deaf passengers, 993.

But carrier must have notice of passenger's disability, 993.

How contributory negligence affected by blindness of passenger, 1231.

BLOCKADE—

Of port no excuse when carrier has contracted to carry in prescribed time, 625, 626.

"BLOWING"—

Of bilge water is peril of the sea, 490, note 65.

[REFERENCES ARE TO SECTIONS.]

BODY—

Swinging beyond outer surface of car when in motion, contributory negligence, 1194.

BOILER—

Explosion of boiler not an act of God, 281.

Unseaworthiness may consist of defects in rivets or bolts on tanks or boilers, 372.

Explosion of boiler not a peril of the sea, 489.

BOLTS—

Unseaworthiness may consist of defect in bolts on tanks or boilers, 372.

BONA FIDE HOLDER OR PURCHASER—

Whether false bill of lading issued by proper agent of carrier good in hands of *bona fide* holder, 161, 162.

When indorsement and delivery of bill of lading is procured by fraud or mistake, no title passes even to a *bona fide* holder, 175.

Transfer of bill of lading after delivery of goods will not vest title in *bona fide* holder, 182.

C. O. D. goods obtained without payment cannot be recovered from *bona fide* purchaser, 730.

When assignment of bill of lading to, defeats right of stoppage *in transitu*, 762.

Sale of goods by carrier without authority passes no title even to innocent purchaser for full value, 785.

BONA PERITURA (See PERISHABLE GOODS)—

BONDS—

Bearing of amount of outstanding bonds on question of reasonableness of rates, 583.

BOOKS—

When baggage, 1244, 1246, 1249, note 5, 1254.

BOX—

Requiring passengers to alight on, 933, note 27.

Leaving uncovered water box on ground where train usually stops, 933, note 33.

BOX CARS—

Carriage of goods in box cars, 506 and notes.

BRAKE—

When passenger carrier liable for injury to passenger from trespasser loosening brake on car, 913.

Passenger carrier not liable for injuries from jar caused by fel-

[REFERENCES ARE TO SECTIONS.]

BRAKE—con.

low-passenger inadvertently setting emergency brake, 924, note 27.

BRAKEMAN—

Wantonly calling, "Jump for your lives," 959, note 30.

No authority to accept passengers on freight train, 964.

Authority of, to eject trespassers, 990, note 20.

Authority of, to waive regulations, 1080.

Assaults by brakeman on passenger, 1094.

With authority to assist passengers to alight, has authority to direct passenger, being carried past his station, to alight, 1177, note 4.

But such direction must be more than advice or information, 1177, note 4.

Has no authority to invite one to ride on engine, 1218, note 16.

BRANCH LINE—

Railroad need not afford same facilities to rival as to its own branch line, 568.

Effect of, in determining the reasonableness of a rate, 586.

BRANDY—

Duty of carrier to prevent leakage of, 631.

BRASS NOSING—

Slipping on, worn smooth by constant use, 940.

BREAKAGE—

Carrier should be informed of brittle nature of goods that are liable to breakage, 333.

Of mirror, 457.

Meaning of exception against, 488, note 60.

BREAKDOWN—

Effect of breakdown of railway communications on right to demurrage, 841, note 13.

BREWER'S WAGON—

Riding upon, 997, note 44.

BRIDGE—

Delay through washing away of, 654.

Responsibility of railway carrier for defects in, 910, 915.

Liability of passenger carriers for bridges giving access to stations, 937.

BRIDGE COMPANIES—

Are not common carriers, 103.

[REFERENCES ARE TO SECTIONS.]

BROTHER—

When liable for payment of sister's fare, 1025, note 12.

BUILDING PLANS—

Measure of damages for loss of, 1363.

BULKHEADS—

In vessel ordinarily need not be water-tight, 375.

BULKY FREIGHT—

In car load lots must ordinarily be unloaded by parties entitled to it, 711.

BULLION ROOM—

In vessel must be reasonably safe, 507.

BUNDLES—

Thrown from express car and injuring passenger, 1011, note 3.

BURDEN OF PROOF—*Common carrier—*

That loss occurred through act of God is on carrier, 287.

As to carrier's contributory negligence, 312.

Burden of proof on carrier under Harter Act to prove vessel seaworthy or due diligence was used to make her seaworthy, 367.

Burden of proof is on shipper to show that unfair means were resorted to in securing a contract containing limitations of liability, 408, note 39.

Some courts hold burden of proof is on owner of goods to show he has complied with condition to file claim for loss in a certain time, 447.

Some courts hold burden of proof is on carrier to show condition was reasonable and owner's failure to comply with it, 447.

Rule in Illinois, 447.

Burden of proving loss was within exceptions in contract is on carrier, 449.

But where loss occurs through excepted cause, burden of proving negligence is on owner of goods, 449.

Burden of proof on carrier to show loss was due to peril of the sea, 490, note 65.

Burden of proof on carrier to show he could not furnish cars needed without jeopardizing other business, 496.

When burden of proof is on shipper to prove that defect in car was not patent on inspection, 508.

[REFERENCES ARE TO SECTIONS.]

BURDEN OF PROOF—*Common carrier*—con.

- Burden of proof on carrier to impeach action of state railroad commission in reducing freight on a particular article, 577.
- Burden of proof on carrier to show transportation in reasonable time after impediment removed, 658, 659.
- Burden of proof on carrier to show that the party to whom he has delivered the goods is entitled to them, 749.
- Burden of proof on shipowner to prove charterer has not used due diligence in loading or discharging vessel, 942.
- Burden of proof on plaintiff to show loss of goods, 1352.
- Burden of proof on carrier to bring himself within exceptions of contract, 1353.
- Rule that burden of proof is upon carrier after bringing his case within exception, to show that he was not negligent, 1354.
- Contrary rule followed in some states, 1355.
- Burden of proof where property injured consists of live stock, 1357.

Passenger Carrier—

- If train be fitted for carriage of passengers, and placed in position where persons are induced to enter as passengers, carrier must show they had notice it was not intended for their use, 997.
- Burden of proving identity to ticket agent is on passenger, 1054.
- Burden of proof on passenger carrier to show cause of delay did not arise from his negligence, 1109.
- Burden of proof on carrier to show reasonable care in protecting property of passenger while asleep in sleeping-car, 1131.
- Mere loss of baggage from sleeping-car raises no presumption of negligence, 1131, 1132.
- But where baggage is lost while passenger is asleep, burden of proof is on sleeping-car company to show that it exercised reasonable care, 1131.
- On passenger to show facts excusing his conduct in alighting from train while in motion, 1177, note 4.
- On gratuitous passenger to show baggage lost through gross negligence, 1300.
- Burden of proof on plaintiff to show negligence by passenger carrier, 1411.

[REFERENCES ARE TO SECTIONS.]

BURDEN OF PROOF—*Passenger carrier*—con.

On defendant to show passenger's contributory negligence, 1417.

View that burden of proof is on plaintiff to show that he was free from negligence, 1418.

BURGLARY—

In country village same degree of security as in larger cities cannot be required of carrier while acting as warehouseman, 717, note 12.

BUSHEL—

When freight is to be computed according to the number of, 812, note 61.

BUSINESS (See **PRESS OF BUSINESS**)—

Carrier may refuse to accept as passengers persons interfering with business of carrier, 966, 970.

May grant exclusive right to solicit on vehicles, 970.

Carrier not liable for loss of use of article intended for use in business, unless informed, when contract is made, of special use to which article is to be put, 1369.

Profits, loss of, through delay in transporting article intended for use in business, carrier not liable for, unless informed, when contract is made, of special use to which article is to be put, 1369.

Knowledge by carrier of general use to which article is to be put, not sufficient to charge him with liability for loss of its use or profits, 1369.

Carrier, ordinarily liable for only such damages as may reasonably be presumed to have been in contemplation of the parties when contract was made, 1367, note 33, 1369.

Carrier, ordinarily liable for only such damages as are the natural and necessary sequence of breach, 1369.

Losses in business not to be allowed unless reasonably ascertained by calculation, 1369.

Party injured must make reasonable efforts to avoid loss, 1369.

BUTTER—

Duty of carrier in respect to shipment of, 505, note 33.

CABOOSE—

Water-closet not required on caboose, 922.

Seat in, passenger sitting on arm of, chargeable with contributory negligence, 1217.

Passenger sitting tilted back in chair of, chargeable with contributory negligence, 1217.

[REFERENCES ARE TO SECTIONS.]

CABOOSE—con.

Passenger lying down in seat of, so that head is likely to bump against frame work, chargeable with contributory negligence, 1217.

Standing in, when in motion, usually contributory negligence, 1217.

But circumstances may excuse passenger's conduct in standing in caboose when in motion, 1217.

Leaving seat in, to get drink of water, not contributory negligence as a matter of law, 1217, note 14.

Standing in, not contributory negligence when seats full, 1217, note 14.

Rising from seat of, and moving toward door after name of station called, not contributory negligence, 1217, note 14.

Passenger voluntarily riding on top of, chargeable with contributory negligence, 1194.

Effect of carrier's acquiescence or directions, 1195.

CABS (See HACKNEY COACHES; HACKMEN)—

Proprietors of, when common carriers, 68.

Degree of care as to safety of passengers required of proprietors of cabs, 898, note 17.

CALAMITY—

Preference may be given to goods intended to relieve distress in time of public calamity, 649.

CALLING FLOOR—

Whether failure of operator of passenger elevator to call floor is negligence, 100, note 41.

CALLING STATIONS—

Duty of carrier as to, 1121.

Effect of, as invitation to alight, 1123.

CAMERA—

When baggage, 1246.

CAMPHOR—

Improper stowage of, 606, note 31.

CANAL-BOATS—

Owners of, are common carriers, 75.

But may show they are mere private carriers for hire, 89.

Departure from contract to carry by, defeats contract of exemption, 480.

Carriage by canal-boats in prescribed time, 627, note 20.

Delay in transportation by, 654.

[REFERENCES ARE TO SECTIONS.]

CAPITALIZATION—

Bearing of capitalization of road on reasonableness of rates, 583.

CAPSIZING—

Vessel capsizing soon after leaving port presumed unseaworthy, 369.

CAPTAIN OF VESSEL (See MASTER)—

CARE (See DILIGENCE)—

Common carriers—

Departure from contract to care for goods while in transit defeats contract of exemption, 480.

In case of accident, carrier must give goods reasonable care and attention, 631-633.

Carrier must give live stock proper attention as such, 634.

Degree of care and diligence required of carriers of passengers—

Not insurers against injuries to passengers through mere accident, 893.

Modern tendency is to hold some classes of passenger carriers to a higher degree of responsibility than was formerly required, 894.

Passenger carrier must exercise for the safety of his passengers *while upon his conveyance* utmost degree of care which human foresight will suggest in view of mode of conveyance, 895.

Usual statement is that carrier is bound to provide for safety of his passengers "as far as human care and foresight will go," 896.

Good faith and an honest purpose to avoid injury are not the equivalent of highest degree of care, 896, note 11.

"Greatest degree of care and foresight" contemplates a higher degree of care than that imposed by law, 896, note 11.

Passenger carrier not required to exercise all the care and diligence of which the human mind can conceive, 897.

Regard must be had to circumstances and means or manner of conveyance, 898.

Due degree of care in driving stage-coach might be recklessness in running railroad train, 898.

Gross negligence at one stage of journey might not be so at another, 898.

Carriers by steam required to exercise even more exact skill, care and diligence than other carriers, 898.

Any negligence on their part, gross, 898.

[REFERENCES ARE TO SECTIONS.]

CARE—*Degree of care and diligence required of carriers of passengers*
—con.

In operation of freight or mixed trains, passenger carrier not held to degree of care which would destroy use of such trains for their primary purpose, 899.

Carrier not liable for mere accidents or casualties which human prudence could not foresee, 900.

Care and diligence due by passenger carrier to discover latent defects, 903-905.

To discover defects in vehicles and machinery attributable to the fault of the manufacturer, 906-909.

To discover defects in bridges, 910.

Carrier must manage appliances on vehicle with high degree of care, 911.

Carrier must exercise high degree of care in keeping spark arresters in repair, 912.

Carrier must exercise the highest degree of care in respect of management and running of vehicles, 923.

If violent storm drives freight train back on passenger track, servants of railroad company must exercise proper diligence in flagging passenger train, 923, note 24.

Carrier must exercise high degree of care to avoid sudden jerks or jars, 924.

Degree of care in respect of stational arrangements not so great as in respect of tracks and running machinery, 941.

In respect of stational arrangements, carrier bound only to ordinary care in view of dangers to be apprehended, 941.

Exceptional rule in Nebraska by statute, 941, note 50.

Passenger on boat must exercise at least ordinary care for his own safety, 942.

Degree of care necessary in protecting property of passenger in sleeping-car, 1131.

Care due by sleeping-car company when passenger away from berth, 1123.

Care due trespassers, 990.

Care due person coming to station to assist passenger, 991.

"CARE OF" THIRD PERSON—

Effect of consigning goods in care of an agent of the carrier, 675.

Or in care of another person, 676.

Consignee for care merely agent; no title vests in, 809.

No implication of contract to pay freight by person in whose care goods are shipped, 809.

[REFERENCES ARE TO SECTIONS.]

CARETAKER—

Failure of shipper of live stock to furnish caretaker does not excuse subsequent negligence of carrier, 642.

CARMEN, ETC.—

In towns and cities, 68, 69, 70.

Power of carman to bind owner of goods by agreement to limitation, 457.

CARRIER—

Every carrier a bailee, 1.

Distinction between private and common or public, 4, 16.

Diligence required of carrier, dependent upon circumstances, 6.

Not usually agent of owner of goods, 12.

May be in case of emergency, 13.

Acts of, not relating to purposes of bailment, ordinarily void, 13.

Liability for losses occasioned by malfeasance or fraud, 14. See COMMON CARRIER; PRIVATE CARRIER; CARRIER WITHOUT HIRE.

CARRIER BY WATER—*Common Carrier—*

Is common carrier, 74, 75.

Delivery to deck hand, 107.

Carrier not liable for loss of baggage retained in custody of passenger, 109.

When liability begins, 113.

How delivery to carrier by water affected by usage, 117.

Delivery to ships and vessels, 120. See DELIVERY TO CARRIER.

Checking of baggage unnecessary, 127.

Delivery to ferry-men, when complete, 128.

Initial carrier not liable if goods perish before he can forward them, 130.

Duty when succeeding carrier neglects or refuses to receive goods, 132.

How duty to make delivery to succeeding carrier affected by usage, 133, 137.

When carrier by water may refuse to accept goods, 147.

General liability of, see COMMON CARRIER.

Exceptions to liability of, see ACT OF GOD; PUBLIC ENEMY.

Exceptions to liability in bill of lading. See PERILS OF THE SEA.

Limiting liability of, see LIMITATION OF LIABILITY BY CONTRACT.

Receipts by, see BILL OF LADING.

Duty as to stowage, see STOWAGE.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—*Common carrier*—con.

Liability of vessel, see SEAWORTHINESS.

Limiting liability by statute, 344. See HARTER ACT.

Duty to defend goods seized on legal process, see LEGAL PROCESS.

Power of agent to contract that goods shall be sent by particular boat, 462.

When not subject to Interstate Commerce Act, 524.

Competition of ocean lines should be taken into consideration under Interstate Commerce Act, 562.

Liability as to care of live stock during transportation, 634.

Carriers by water and by railway not required to make personal delivery, 687.

Carrier by water must land goods at wharf and notify consignee or owner, 687.

Must provide suitable and safe place for landing goods, 688.

Not discharged from liability by landing at exposed place without protection and notifying consignee, 688.

Duty of carrier by water when consignee refuses to receive the goods, 688, note 12.

After the consignee accepts the goods, duty of protecting property is cast upon him, 688, note 12.

Duty of carrier by water as to perishable goods, 688, note 12.

Carrier by water must give notice of arrival and allow reasonable time for removal, 689.

When responsibility as carrier ceases, 689.

When notice to consignee must be actual, 690.

Publication in newspaper insufficient, 690.

Notice to clerk, 690, note 15.

Notice to consignee's wife, 690, note 15.

Notice by mail, 690.

Custom to notify by mail, when valid, 690.

Goods must be put in situation for removal, 691.

Goods must be separated so as to afford consignee opportunity for inspection and removal, 691.

Must be conveniently accessible, 691.

Consignee not bound to accept on Sunday or other legal holiday when labor forbidden, 692.

On holidays when labor not forbidden bound to accept, 692.

Unless right to refuse on such day established by custom, 693.

Labor Day, 692, note 21.

Fourth of July, 693.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—*Common carrier*—con.

Consignee must remove goods within a reasonable time, 694.
Consignee must use ordinary diligence in removing goods to place of safety, within reasonable distance of wharf, 694.
Responsible for loss occasioned by unreasonable delay in removing, 694.

Carrier cannot land goods unnecessarily and unreasonably distant from place of business of consignee, and require removal as rapidly as if at proper distance, 694.

Rights and duties of carrier and consignee reciprocal in this respect, 694.

Notice of arrival of goods must be given to consignee, if he can be found by reasonable diligence, 695.

Cannot warehouse goods without due effort to find consignee, 695.

Unless proper effort to find and notify consignee be made, carrier still liable as such for safety of goods, 695.

Necessity of notice may be waived by usage, 695.

Usage may be long continuance of same course of business with one consignee or the uniform usage and course of business of carriers in the same trade in which he is employed, 696.

Necessity of notice may be dispensed with by contract, 697.

At what wharf delivery must be made, 698.

Effect of usage on choice of wharf, 698.

Delivery at ship's tackle, 699.

Mode of delivery may be established by usage, 700.

Delivery to custom house officials, 700.

When goods seized on legal process, carrier by water must defend suit until owner notified, 744.

When carrier by water may sue for freight, 828, 829.

Carriers by water have lien for their charges, the same as carriers by land, 864, note 14.

But carrier by water cannot detain goods on board ship where consignee would have no opportunity of examining their condition, 864, note 14.

Rights of respective owners of ship and cargo are reciprocal, 864, note 14.

Right to a lien for freight gives a right to a lien upon the ship for due performance of contract for safe carriage and delivery, 864, note 14.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—con.

Passenger carrier—

Injury to passenger from beam while discharging lumber, 890, note 1.

When carrier not liable for injuries due to panic and stampede of fellow-passengers, 900.

Or for injuries due to passengers running to one side of boat, 901.

Liability of carrier for defective halyards, 911.

For unguarded openings in deck, 911.

For defective appliances in bringing boat to dock, 911, note 25.

When carrier liable for injury to passenger although the immediate cause of injury is the negligent operation of another boat, 913.

Carrier liable for injury from leaving hatchway open in hulk used by him in embarking passengers, 916.

When steamboat owner is liable for acts of lessee, 918.

Duty of carriers by water in respect to wharves, approaches and stational facilities, 942.

Must provide reasonably safe and suitable docks, 942.

Duty also extends to safely mooring vessel to dock, 942.

But passenger must exercise at least ordinary care for his own safety, 942.

Carrier liable if insufficient light provided, 942.

Or if passenger injured by stepping into hole on wharf, 942.

Carrier must provide suitable gang plank, 942.

When guard rails necessary for gang plank, 942.

Roadways and bridges leading to wharf or boat must be maintained in reasonably safe condition, 942.

Liability of ferry company to passengers for stational facilities and mooring boat, 942, notes 6, 9 and 13.

Passenger chargeable with contributory negligence if he does not avail himself of arrangements for a safe boarding or landing, 942.

Carrier liable for injuries to passenger from careless handling of vessel's appliances, 942.

Keeping floor near water-cooler in steerage dry, 957, note 14.

Passenger falling over table socket in dining saloon, 957, note 14.

Ice on deck of ferry-boat, 957, note 14.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—*Passenger carrier*—con.

Merely going on board to inspect vessel, or to select or reserve berth, does not create passengership relation, 1005, note 37.

Assaults of carrier's servants upon passengers, 1093.

Passenger carriers by water are subject to general rules regulating other carriers, 1147.

Regulations respecting, prescribed by act of congress, 1148, *et seq.*

Penalties imposed for dangerous practices, 1149.

Regulations as to licensing officers, etc., 1150.

Statutory regulations as to safety, 1151.

Government of merchant vessels, 1152.

Regulations to prevent collisions, 1153.

Purpose of these statutory regulations, 1154.

Do not diminish carrier's responsibility for negligence, 1155.

Evidence of strict conformity to statutory regulations affords no presumption of due care, 1155.

Duty to furnish food and other necessities during voyage, 1156, 1157.

Effect of passenger voluntarily accepting poorer accommodations rather than not to make journey at all, 1156.

Reselling stateroom, 1156, note 4.

In absence of contract or usage to contrary, steerage passengers not entitled to be furnished bedding, 1158.

Carrying dogs in steerage cabin, 1158.

Authority of master of ship, 1159.

Passenger may be required to perform necessary services in case of extraordinary danger, 1159.

Master cannot require greater exertion or exposure of passenger than strictly necessary, 1160.

Passenger entitled to respectful and courteous treatment, 1161.

Master stands in *loco parentis* to minors and female passengers, 1162.

Duty to aid sick or disabled passengers, 1163.

Whether carrier by water bound to furnish a physician, *quaere*, 1163, note 17.

But errors, mistakes or negligence of ship's doctor not chargeable to carrier when no negligence shown in selecting him, 1163.

Passenger must conduct himself properly, 1164.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—*Passenger carrier*—con.

Master may coerce into good behavior or exclude from society of those whom he annoys, 1164.

Such power to be exercised with great care and only upon good grounds, 1164.

Duty of carrier by water to furnish berths, 1165.

When carrier by water liable for material delay in departure, or non-observance of schedule, 1166.

Carrier by water not bound to deliver telegrams addressed to passengers, 1167.

Passengers may refuse to be carried in unseaworthy ship, 1168.

Liability of carrier by water continues until passenger and his baggage are safely landed, 1169.

Not relieved from liability by provision in contract that landing shall not be deemed part of voyage, 1169.

Custom as to landing of passengers or their baggage must be reasonable, 1169.

Passengers must be given reasonable time to disembark with their stores, 1169.

When act of God will excuse non-performance of contract to carry passengers and their baggage, 1169.

Low water, unless utterly unforeseen and wholly unexampled, no excuse, 1169.

Liability where bay at passenger's destination is ice-bound, 1169.

In master's discretion as to how near he will approach the mouth of a river, 1169.

Delivery of baggage to, on representation of agent that it will be placed in stateroom when received, 72, note 60.

Carrier by water, liability of, for baggage taken by passenger into his stateroom, 1268.

Carrier by water, not liable for clothing, money or jewelry in custody of passenger, 1269.

Carrier by water, not liable for watch worn by passenger, 1269.

Carrier by water, not liable for money stolen from passenger while asleep in his berth, 1270.

Carrier by water, not liable for theft of trunk of steerage passenger tied to his berth, 1270.

Carrier by water, under New York rule, liable as innkeeper for baggage kept by passenger in his stateroom, 1271.

[REFERENCES ARE TO SECTIONS.]

CARRIER BY WATER—*Passenger carrier*—con.

Carrier by water, under New York rule, liable for money carried by passenger as traveling expenses which is stolen from his stateroom, 1271, note 26.

Carrier by water, liable for loss of watch, chain and pocket-book carried by passenger in his stateroom, unless due to negligence or fraud of passenger, or to act of God or public enemy, 1271, note 31.

Carrier by water, liable for baggage seized by officer of boat and thrown into sea, 1271, note 31.

Carrier by water, not liable for loss of baggage, which is attributable to passenger's negligence, 1272.

Negligence of passenger in refusing to leave crowded boat at request of carrier's servants, no excuse to carrier for attempting to make trip with boat loaded beyond its capacity, 1173, note 1.

CARRIER WITHOUT HIRE—

Liable for negligence or malfeasance only, 5, 23.

May protect himself by contract against accountability for negligence or misfeasance, 14.

As to responsibility not distinguishable from other ordinary bailees, 15.

Who deemed to be, 16.

Liable for gross negligence, 17, 18, 19.

Undertaking to carry a sufficient consideration for such liability, 18.

Carriage not gratuitous where carrier has right to demand compensation, 19.

Intentions of carrier, not communicated to bailor, make no difference, 19.

Presumption as to whether carriage is gratuitous, 20.

Not gratuitous bailee when incidental advantage to himself inducement to carriage, 21.

Nor where shipper of goods, paying freight, travels with them, 21.

Nor of baggage of passenger paying fare, 21.

Question of gross negligence one of fact, 22, 32.

Not liable for loss by robbery, provided ordinary prudence used, 23.

Degree of negligence which creates liability, 24, 25, 26, 27.

Illustrations of this liability, 24-27.

Unauthorized delivery of goods to third person by, a conversion, 26.

[REFERENCES ARE TO SECTIONS.]

CARRIER WITHOUT HIRE—con.

Loss of his own goods simultaneously with those of another, presumptive evidence of diligence, 28, 30.

But not conclusive, 29.

Presumed to have done his duty, 31.

Failure to deliver goods by, not accounted for loss, by gross negligence presumed, 31.

When necessary to show appropriation to his own use, or demand and refusal to deliver, 31.

Question of negligence, how determined, 32.

Actions against gratuitous carriers, 33.

Evidence of negligence, 33.

Statements of bailee, when evidence, 33.

Requisites of declaration, 34.

Executory promise by, to carry goods, *nudum factum*, 34.

Goods must be accepted by, to impose liability, 34.

CARS—

Common carrier—

Agreement to furnish cars at certain time—effect of acceptance of bill of lading after oral agreement made, 174.

Icing cars as evidence of a contract for through carriage, 239.

Act of God no excuse for failure of carrier to furnish cars at certain time and place, 268, note 4.

Station agent has implied authority to agree to furnish a reasonable number of cars for live stock at certain date, 462, note 19.

Shipper must inform carrier a reasonable time ahead when car required for his exclusive use, 495, note 6.

Duty of carrier then to advise shipper whether car will be furnished, 496, note 7.

Carrier liable if he misleads shipper in that respect, 496, note 7.

Burden of proof on carrier to show he could not furnish cars needed without jeopardizing other business, 496.

Liability of carrier for defective cars, 498, 499, 500.

Inspection of cars, 501.

Exposed cars, 504.

Refrigerator or ventilated cars, 505.

Icing or re-icing cars, 505.

Open or closed cars, 506.

How where shipper selects cars, 508.

Carrier's duty in furnishing cars for live stock, 509.

[REFERENCES ARE TO SECTIONS.]

CARS—*Common carrier*—con.

Liability of carrier for furnishing cars affected with any contagious disease, 509.

Liability of carrier for furnishing cars with defective stalls or bedding, 509.

When mandamus will lie to compel carrier to furnish coal cars, 512, note 59.

When mandamus will lie to compel railroad company to haul special cars, 512, note 60.

Giving preference to favored shippers in furnishing cars, 520, note 15.

Apportionment of cars for coal mines under section three of Interstate Commerce Act, 557.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Stowage upon freight cars of railroad companies, 610.

Contracting to carry without change of cars, carrier liable for loss if he does change, 620.

Authority of agents of carrier to agree to furnish car on given day, 630.

Carrier liable if he smothers hog by placing it in steam-heated car, 634, note 36.

In case of accident, should place cars in position where shipper can attend to wants of animals, 634, note 36.

Management of cars containing live stock, 639.

Use of cars as warehouses, 714, note 4.

Inability to get cars before increased rate becomes operative through no fault of carrier does not relieve shipper from reasonable increase, 804, note 30.

Detention of cars of railroad company by consignee beyond a reasonable time, see Demurrage.

Passenger carrier—

Carrier bound to same degree of care as to passenger upon crudely built car as upon a Pullman car, 898, note 16.

Passenger carrier must exercise for the safety of his passengers *while upon his conveyance*, the utmost degree of care and diligence which human foresight will suggest in view of mode of conveyance employed, 895.

Liability of carrier for defective seat in car, 911.

For defective fastening on window, 911.

[REFERENCES ARE TO SECTIONS.]

CARS—*Passenger carrier—con.*

For defective doors, 911.

For misplaced coupling pins, 911.

For defective berths, 911.

For defective ladders on freight cars, 911.

For upright iron flanges on car platform, 911.

But railway company not bound to furnish glass doors for car, 911, note 22.

Liability of passenger carrier for injury caused passenger by articles brought into vehicle by another passenger, 920.

Liability for articles falling from parcel racks, 920.

Liability for baskets or valises placed in aisle, 920.

When carrier liable for injury caused passenger by dangerous articles brought into vehicle by another passenger, 920, 921.

Duty of carrier to supply cars with necessary service and accommodations, 922.

Duty includes supplying adequate corps of servants, 922.

With suitable retiring places, 922.

With seats if a day coach, 922.

With proper berths if a sleeping-car, 922.

With light and warmth, 922.

With drinking water, 922, note 12.

But retiring place not necessary on caboose, 922.

Carrier must exercise the highest degree of care and diligence in respect of management and running of vehicles, 923.

Injury to passenger's hand or fingers by sudden closing of door or window on carrier's vehicle, 927.

In absence of custom, carrier need provide no entrances to train by express or baggage car, 927.

Carrier under no duty to provide vestibuled trains, 927.

If vestibules are provided, carrier must see they are kept in repair, and are not needlessly left open, 927.

If old cars used, they must be kept in good repair, 952, note 6.

CAR SERVICE ASSOCIATIONS—

Reasonable rules and regulations of car service associations will be upheld, 861, 862.

Such associations are not inimical to the public welfare, 861, note 3.

CARTAGE CHARGES—

Rebate equal to cartage charges is discriminative under Interstate Commerce Act, 545.

[REFERENCES ARE TO SECTIONS.]

CARTERS—

When common carriers, 08.

CASE (see FORMS OF ACTION) —

Action of, when appropriate, 1324, *et seq.*

CASH FARE—

Higher, when paid on train, 1033.

Recovery back of, when ticket office prematurely closed, 1033.

Production of train tickets given on payment of, 1037.

Actual payment of cash fare not necessary to render stipulations against negligence, void, 1073.

CASTINGS—

Duty of carrier by water as to putting heavy castings in situation for removal, 691, note 20.

CATTLE (see LIVING ANIMALS) —

When loss of cattle is a peril of the sea, 489.

Care due by carrier to cattle during transportation, 634.

Space for cattle must be sufficiently ventilated, 635.

Unreasonable delay in transportation of, 652, and notes.

CATTLE-YARDS—

Duty of carrier to supply, 510.

CAUSA PROXIMA NON REMOTA (see PROXIMATE CAUSE) —

CEMENT—

Improperly caulked deck makes vessel unseaworthy as to cargo of cement, 371, note 16.

“CESSER” CLAUSE—

Effect of, in charter party, 854.

Cesser and lien clause to be read as co-extensive, 854.

CHAIN LOCKER—

Vessel may be unseaworthy as to cargo of sugar through defect in chain locker of vessel, 375, note 33.

CHAIR—

Defective chairs in waiting room, 931.

In caboose, passenger sitting tilted back in, chargeable with contributory negligence, 1217.

CHAIR-CAR—

Extra rate may be charged for, 1077, note 17.

CHANGE—

When change in destination may be made by shipper, 193-196.

[REFERENCES ARE TO SECTIONS.]

CHANGING CARS—

Contrary to agreement, defeats contract of exemption, 480.

CHARACTER—

Passenger carrier may refuse to accept persons of bad character, 966.

CHARACTER OF GOODS—

Conclusiveness of receipt or bill of lading as to, 163, *et seq.*

Right of carrier to know, 795, 796. See Dangerous Goods.

CHARTERER—

If charterer binds himself absolutely to load or unload within a certain time, he takes the risk of all unforeseen circumstances, 833.

Bears risk of delay from crowded state of harbor, 833.

Or bad weather preventing access to vessel, 833.

Immaterial whether shipowner is also prevented from doing his part of work, unless in fault, 833.

Strike of dock laborers not caused by unreasonable conduct of shipowners will not relieve charterer where absolute promise to pay demurrage, 833, note 47.

Where cargo to be delivered within reach of ship's tackle charterer not exempted by breakdown of lighter, 833, note 47.

Stipulation for definite lay days makes charterer responsible for delay from loss of machinery for loading by fire, 833, note 47.

Delay caused by actual firing of guns from enemy's ship of war upon forts in harbor not a detention "by default of" charterers, 833.

Even though time for work definitely fixed, charterer not liable for delay caused by the default of shipowner, 834.

Or where stevedoring is done by an employe of the ship's agent, 834.

When parts of days included in estimating demurrage, 838.

Charterer's liability may be restricted by exceptions, 841.

Restrictions may be against strikes, droughts, political occurrences, quarantine, flood, storms, fire, and the like, 841.

Courts will give a reasonable meaning to exonerating language, 841.

Effect of charterer leaving loading or unloading to dock company, or third person, 844.

Rights and duties of shipowner and charterer are reciprocal, 844.

Charterer must have cargo ready for loading, 845.

Except where duty has been modified by controlling usage, 845.

[REFERENCES ARE TO SECTIONS.]

CHARTERER—con.

Charterer's duty to provide appliances for loading or unloading, 846.

Vessel has the right to assume that dockage for piling cargo will be supplied with reasonable promptitude by charterer, 846.

Charterers using every endeavor to procure necessary customary port appliances, not liable for delay in securing those appliances due to causes beyond their control or constituted port authorities, 846.

When vessel to proceed to berth "as ordered," charterer given option in choice of berth, 850.

Charterers not then liable for crowded condition of dock, 850.

Charterer not liable for delay without his fault after loading completed, 852.

Not liable where vessel frozen in while being loaded, and detained on that account after loading completed, 852.

But charterer liable for detention in loading beyond a reasonable time, although, even if loaded on time, ship would have been prevented by ice from sailing earlier, 852.

Charterer not liable for delay due to master's absence from vessel, 855.

No demurrage allowable for delay through arbitrary stoppage by master until security given, 855.

Master cannot detain goods on board for non-payment of freight, or general average, and charge demurrage, 855.

Quasi demurrage for a reasonable sum might be allowable under such circumstances, 855.

See DEMURRAGE.

CHARTER PARTY—

Variance between charter party and bill of lading, 156.

CHARTER POWERS—

Of corporations as affecting right of state to regulate rates, 574, note 10.

CHECK—

Taking check of consignee dishonored without laches of carrier does not discharge consignor, 810.

CHECKING BAGGAGE—

Regulations as to, 1077, note 17.

CHILD—

Carrier should warn children of danger and must not knowingly allow them to occupy positions of danger, 995.

[REFERENCES ARE TO SECTIONS.]

CHILD—con.

Conduct scarcely blamable with grown person might be reckless in dealing with child, 995.

Not compelled to see that child female passenger does not leave her seat or disembark from train, 995, note 39.

Child entering car to play not a passenger, 1001.

Carriage of children free, 1020.

Person traveling with child in his custody liable for payment of child's fare, 1025.

If carrier wrongfully ejects child, parent may get off also and recover for wrongful expulsion of both, 1025.

Duty of carrier to tender back fare when parent is ejected for non-payment of child's fare, 1087.

Master stands *in loco parentis* to, 1162.

Same care and caution not required of, as in case of adult, 1227.

When negligence will be imputed to, 1228.

Whether child to be charged with contributory negligence, question for jury, 1228.

Imputability of the negligence of those who have infants in charge, 1229.

View that the negligence of parent or guardian is to be imputed to child, 1229.

This view adopted by the English courts, 1229.

Better rule is that the negligence of person who has child in charge is not to be imputed to child, 1229.

But where the negligent parent or guardian seeks to recover in his own right for injury to child, his negligence will be a defense, 1229.

Parent's right of action for injury to minor child, 1377.

Recovery of child's funeral expenses, 1378.

When parent may recover exemplary damages, 1378.

Mother's recovery for loss of services of unemancipated child, 1378.

Child has no right of action at common law for injury to parent,
• 1380.

Effect of child's contributory negligence on parent's action, 1381.

Recovery by posthumous and illegitimate children under Lord Campbell's Act, 1395.

CHINESE—

Use of Chinese crew may show lack of due diligence in manning vessel, 381.

[REFERENCES ARE TO SECTIONS.]

CHUTE—

Carrier not liable to shipper of live animals for defective chute when he has no notice that shipper intends to use that chute, 510, note 52.

CINDERS—

Responsibility of passenger carrier for escaping, 912.

Responsibility of passenger carrier for cinders blown through open door or window, 927.

CIRCULARS—

Effect of circulars sent by carrier to shipper on authority of agent, 462, note 19.

CIRCUS TRAIN—

Liability of railroad company in transportation of, 88.

CITRON—

Improper stowage of, 606, note 32.

CITY EXPRESS COMPANIES—

When common carriers, 70.

CITY ORDINANCE—

Providing for punishment of any person getting on or off railway train while in motion, not within police power of city, 1182, note 16.

Providing for fine of any person, not in employ of railroad company, who jumps on or off train while in motion, void as unreasonable attempt to regulate rights of passenger and carrier, 1182, note 16.

CIVIL WAR (see WAR)—**CLASSIFICATION SHEETS—**

Under Interstate Commerce act in force at date of shipment, govern, 537, note 39.

“CLEAN BILL OF LADING”—

What is a, 603.

Parol evidence not admissible to vary a, 603.

CLERK—

Notice by carrier by water to clerk of consignee of arrival of goods, 690, note 15.

Delivery by express company to clerk of government bakery, 718.

CLOAK—

When baggage, 1246.

CLOTH—

When baggage, 1246, note 25.

[REFERENCES ARE TO SECTIONS.]

COACH—

May receive passenger's baggage anywhere on route, 111.

COAL—

Railroad company cannot refuse to transport coal on ground that it is of inferior quality, 144, note 1.

Vessel may be unseaworthy through insufficiency of coal to complete the voyage, 376.

When mandamus will lie to compel carrier to furnish coal cars, 512, note 59.

Discrimination in coal car distribution under section three of Interstate Commerce Act, 557.

Difference in coal or method of handling it may justify different charge under state statutes, 588.

Injury to passenger by coal thrown from passing train, 1011.

COAL DUST—

Damage from, not a peril of the sea, 490, note 65.

Vessel liable for injury to goods from coal dust while discharging cargo, 609.

COCOANUT OIL—

Stowing plumbago near, 606, note 30.

C. O. D. GOODS—

Effect of carrier holding goods without giving notice to consignor on consignee's promise to pay, 721, 722.

Undertaking of carrier who accepts C. O. D. goods, 726.

Not bound to accept unless customary part of his business, 726.

Accepting, held to strict compliance with instructions, 727.

Goods delivered without exaction of amount due, carrier liable, 727.

Such delivery a conversion, 727.

But wrongful delivery may be ratified, 727.

Obligation to collect on C. O. D. goods rests on contract, express or implied, 728.

Such contract may be verbal, 728.

Need not be incorporated in receipt, 728.

C. O. D. goods delivered to carrier who never undertook performance of such duties, no contract to collect implied, 728.

Words "please collect" in bill accompanying goods, mere request, 728.

Carrier of such goods must, if necessary, retain them a reasonable time to enable consignee to pay for them, 729.

[REFERENCES ARE TO SECTIONS.]

C. O. D. GOODS—con.

Immaterial whether charges demanded are freight or price of goods, 729.

After tender to consignee carrier holds goods as warehouseman, 729.

Consignee peremptorily refusing to accept, carrier may immediately return goods to consignor, 729.

Not bound to offer goods more than once, 729.

Not compelled to return, but may notify consignor and await instructions, 729.

May ordinarily recover goods obtained without payment, but not from *bona fide* purchaser, 730.

Liability of carrier for return of money, 731.

In the absence of express authority agent of carrier cannot guarantee price of goods, 732.

COFFEE—

Duty of carrier when coffee becomes wet during transportation, 631.

COLD (see FREEZING; FROST; WEATHER)—

Carrier liable for injuries to animals due to negligent exposure to cold, 342, note 1.

When carrier liable for exposure of goods to cold, 502.

Carrier liable for exposure of animals to cold, notwithstanding exceptions, where directions of shipper as to mode of carriage not followed, 611.

But carrier not liable for injury to goods from cold through following directions of shipper as to mode of carriage, 612, note 51.

Injury to cattle by exposure to cold, 634, note 37.

COLLATERAL CONTRACTS—

Carrier's lien does not extend to damages arising from breach of, 866.

COLLEGE PRESIDENT—

Delivery by express company to college president of packages addressed to students, 719.

COLLISION—

On land not an act of God, 281.

When collision through negligence of another carrier will excuse delay, 654.

When carriers may be sued jointly or severally for, 917.

Collision of freight and passenger trains, 923.

[REFERENCES ARE TO SECTIONS.]

COLLISION OF VESSELS—

Whether act of God, 281.

When collision of vessels a peril of the sea, 483.

When passenger carrier liable for, 913, note 34.

When carriers may be sued jointly or severally for, 917.

Statutory provisions as to, 1153.

COLLUSION—

Seizure of goods under legal* process to be an excuse for non-delivery must not have been brought about by collusion of carrier, 745.

Colluding with conductor to ride on freight train, 964.

Person colluding with conductor, brakeman or other employe, not a passenger, 1001.

COLORED PERSONS—

Providing separate rooms in stations for, 943.

Separation of, from white passengers, 972, and notes.

Assault on, by white passengers, 981, note 1.

No greater damage because colored train hand assisted in expulsion of white man, 1084, note 19.

Ejection of colored man from white man's car, 1084, note 19.

"COMMISSION"—

To "transit" company illegal when used as cloak for secret rebates, 539.

COMMON CARRIER—

DEFINITIONS AND ILLUSTRATIONS OF—

Common carrier defined, 47.

Common carrier not usually agent of owner of goods, 12.

But may be agent in cases of emergency, 13.

Common carrier liable for malfeasance and fraud, 14.

If goods carried as a mere gratuity, common carrier becomes private carrier as to them, 16.

Carriage not gratuitous where carrier has a right to demand compensation, 19.

Intention of carrier that carriage should be gratuitous, not communicated to bailor, makes no difference, 19.

Presumptions as to whether carriage is gratuitous, 20.

Not gratuitous where indirect compensation derived, 21.

Liability of common carrier compared with that of private carrier for hire, 43.

Cannot become private carrier by contract, 44, 153.

Essential characteristics of, 48.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—DEFINITIONS AND ILLUSTRATIONS OF—con.

- Holding oneself out as common carrier, 49.
But holding out not always necessary to constitute, 50.
Exception to general rule in Pennsylvania, 50, 51.
In England, the obligation to carry at request, upon the carrier's particular route, is the criterion, 51.
Exception to general rule in Tennessee, 52, 53.
Exception confined to carriers by water, 53.
Rule as at common law as to carriers by land, 53.
Elsewhere, public profession necessary to constitute common carrier, 54.
Farmer or manufacturer as common carrier, 54.
Casual use for others of vessel not engaged in general carrying business does not render owner liable as common carrier, 54, 85.
Owners of river flat boats broken up or sold at end of each trip as common carrier, 55.
Casual use of sloop does not make its owner a common carrier, 56.
General rule now well settled that public profession is necessary to constitute common carrier, 57.
How common carrier compares with inn-keeper, 58.
Goods must be of kind he professes to carry, 59.
Must undertake to carry by customary means and route, 60.
Compensation for carriage in some form necessary to constitute one a common carrier, 61.
Action must lie for refusal to carry, 62.
Regular trips or fixed termini not necessary, 63.
Mode and distance of transportation immaterial, 64.
Hoymen, bargemen, lightermen, canal-boatmen, etc., are common carriers, 65.
Ferryman are common carriers, when, 66.
Whether ferryman are common carriers of goods retained in the custody of the passenger, 67.
Owners of stage-coaches, omnibuses, carts, wagons, cabs, drays, etc., are common carriers when, 68, 69.
Passenger carriers are common carriers as to passenger's baggage, 69.
City express companies usually common carriers, 70.
Warehousemen, wharfingers and forwarders of freight are, when, 71, 72.
When prepayment of freight charges is a condition precedent

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—DEFINITIONS AND ILLUSTRATIONS OF—con.

to assuming liability, until payment is made, carrier liable only as warehouseman, 72.

Shipowners, common carriers when, 74.

Owners of steamboats and canal boats are common carriers when, 75.

Railroad companies are always common carriers, 76.

Railroad receivers and trustees of bondholders are common carriers, 77.

Street railways are common carriers, 78.

Sleeping and parlor-car companies not common carriers, 79, 1130.

Express companies always common carriers, 80.

Express companies bound to personal delivery of goods, 81.

Strictly responsible for subsidiary means of transportation, 82.

Carrier whose vehicle employed likewise liable according to terms of contract with his employer, 82.

Express companies cannot escape responsibility by assuming name of "forwarder," 83.

Common carrier cannot escape liability by assuming name of "dispatch company," "fast freight line," etc., 84.

Ownership of means of transportation not essential to constitute a common carrier, 84.

Common carriers not always liable for everything intrusted to them, 85.

Stage-owners not usually liable as common carriers, for goods intrusted to them, 85.

Owner of ship hired under charter-party not liable as common carrier, 85.

Carrier of passengers and goods not liable for money intrusted to agent unless usage to carry money established, 86.

Whether railroad company furnishing motive power and road only, liable as common carrier for goods in car hired by owner, *quaere*, 87.

How, when railroad company does not own cars—circus trains, 88.

Owner of canal or ferry-boat may show that he is mere private carrier for hire, 89.

Common carrier can only be required to carry such kinds of goods as he holds himself out to carry, 90, 91.

Meaning of word "goods," 90.

Goods must be delivered into carrier's actual possession, 92.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—DEFINITIONS AND ILLUSTRATIONS OF—con.

- Owner of tow-boat not common carrier, 92.
- Passenger carriers not common carriers of persons, 93.
- But are as to baggage, 93.
- Persons in mail service not common carriers, 94.
- Telegraph and telephone companies not common carriers, 95.
- Livery stable keepers are not common carriers, 96.
- Whether messenger companies are common carriers, 97.
- Log-driving companies not common carriers, 98.
- Drovers and agisters not common carriers, 99.
- Whether owners and managers of passenger elevators are common carriers, 100.
- Must allow passengers reasonable time to enter or leave car, 101.
- Duty of owners and managers of passenger elevators as to doors, stools, speed, etc., 100, 101, 102.
- When negligence will be presumed in management of passenger elevators, 102.
- Bridge, canal and turnpike companies not common carriers, 103.
- Cannot become warehouseman of goods while they are in transit, 141, 142.
- Liable as carrier for goods stored on the route, 141, 142.

CARRIER'S DUTY TO ACCEPT AND CARRY GOODS—

- Not bound to accept every kind of goods, nor any kind, under all circumstances, 143, 144.
- May, by public notice, relieve himself from obligation to carry particular kinds of goods, 144.
- May refuse to carry goods improperly packed or otherwise unfit for carriage, 145.
- Or of a dangerous character, 145.
- Or even when contents unknown, if suspicious, 145.
- Press of business may justify refusal of carrier to accept goods, 146.
- May refuse to accept when he does not carry to place where owner wishes to send, 147.
- Or when tendered at an unreasonable hour or place, 147.
- Or when goods would be exposed to unusual danger, 147.
- Or when cars must be used in freighting coal for his own consumption, 146, note 6.
- Carrier may make reasonable regulations as to manner in which commodity will be received for transportation, 147, note 9.
- Carrier obliged to accept only from owner of goods or his authorized agent, 148.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY TO ACCEPT AND CARRY GOODS
—con.

Acceptance in good faith from, and delivery to person not owner but in apparent control is not a conversion, 148.

But taking by mistake other goods than those he is directed to take may be a conversion, 148.

Mandamus will not lie to compel carrier to accept and carry goods, 149.

Mandatory injunction lies to compel acceptance and carriage of goods, when, 149.

May demand prepayment of freight, 150.

May refuse to carry till freight paid, 150.

Actual acceptance may waive reasons for refusal, 151.

CONNECTING CARRIERS (see CONNECTING CARRIERS)—

Carrier not bound by law to assume liability beyond terminus of his own line, 226.

But carrier may contract to carry beyond terminus of his own line, 226.

What circumstances necessary to show contract by carrier to assume liability beyond his own line, 227.

Rule in Muschamp's case as to liability beyond his own route, 228, 229.

Interstate Commerce Act makes initial carrier liable, 235.

Intermediate carrier may still be held directly liable, 236.

Early Georgia cases held first carrier exclusively liable, 236.

Carrier may contract for entire transportation, 237.

What constitutes such a contract, 238, 239.

Extent to which carrier may limit his liability under contract for through carriage, 240.

Implied powers of agents to make such contracts, 241.

Local freight agent may have such authority through usage, 241.

In England, carrier accepting goods directed to destination beyond his own route responsible for carriage to that place, and succeeding carriers not, 228, 229.

English rule prevails in many states, 230.

English rule denied in majority of states, 231.

This conflict more apparent than real, 232.

Liability beyond terminus may be excluded by contract, 233.

Even when liability fixed by statute, 234.

No distinction between corporations and other carriers in respect to power to enter into contracts of through carriage, 242.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CONNECTING CARRIERS—con.

No liability for loss beyond his own line under contract to carry to end of line and there to deliver to next carrier, 243.

Undertaking "to forward," how construed, 244, 245, 246.

Authority of contracting carrier to bind connecting carrier by contract, 248.

PARTNERSHIP AND ASSOCIATION BETWEEN CARRIERS—

Individuals and corporations may become partners as carriers, 249.

In such case, jointly liable, 249.

Proprietors of stage lines employing drivers for different sections of road, and dividing profits and losses, are partners, 249, 250.

Otherwise, when each bears expenses and receives profits of his own section, one acting as agent for collection of fare for others, 250.

Or where there is mere division of gross receipts, 250.

Partnership not necessary to joint liability, 251.

Arrangements for carriage between connecting lines sometimes create joint liability, and sometimes do not, 251.

Proprietors of connecting stage lines each responsible for misconduct of driver jointly employed, 252.

Goods lost on wharf boat of association of carriers, liability joint and several, 253.

Liability of associated railways for lost freight, 254.

Liability of associated railways for lost baggage, 255.

When railroad and steamship companies are not jointly liable, 256, 257.

No joint liability when separate tickets sold by common agent, though all the tickets equivalent to one through ticket, 258.

Nor by similar contracts being entered into by several railroads with same dispatch company, 259.

Nor when common agent collects fare for two or more connecting carriers, 260.

Carrier selling ticket to passenger to go beyond his own line, liable for the fault of connecting carrier, 261.

Effect of establishing joint or through rates, 262.

Contract for division of freight in certain proportions renders carriers liable as partners, 263.

Where each bears expenses of his own route, and profits divided according to distances or otherwise, not partners, *inter se*, or as to third persons, 263.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—PARTNERSHIP AND ASSOCIATION BETWEEN CARRIERS—con.

Railroad companies and other incorporated companies may become partners at least to third persons, 264.

EXCEPTIONS TO CARRIER'S LIABILITY BY LAW—

Losses arising from act of God—

Carrier not liable for, 266.

May become so by contract, 266.

Language must be clear to have this effect, 266, 267.

What is meant by the "act of God," 269.

Act of God no defense for failure of carrier to furnish cars at certain time and place, 268, note 4.

Some courts give broader meaning to "act of God" than other courts give, 270, 271.

Inevitable accident in no way attributable to fault of carrier or human agency, 270, 273.

Anchor, concealed, 275.

Bank, washing away of, 274.

Boiler, explosion of, 281.

Collision on land, 281.

Collision of vessels, 281.

Earthquake, 271, 283.

Elements, 271.

Explosion, 281.

Fire, 279, 280.

Floods, 271, 292.

Freezing of canals or rivers, 273.

Freshet, 270, 282.

Hazy weather, 278.

Hurricane, 286.

Inundation, 271, 282.

Landslide, 284.

Lightning, 271.

Rainfall, 274, note 17.

Rock, hidden, 270.

Snag, 270.

Snowstorm, 278, 285.

Squall of wind, 275, 276, 277.

Tempest, 274, note 17.

Tide, reflux of, 289.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY LAW

—*Losses arising from Act of God*—con.

Washing away bank, 274.

Wind, 272, 275, 276, 277, 280, 286.

Act of God must be proximate cause of loss, 274.

Human agency must not have intervened, 275.

Carrier responsible for loss arising from mistake, loss of presence of mind, or want of skill or judgment in avoiding danger, 275.

Burden of proving loss occurred through act of God is on carrier, 287.

When loss would not have occurred except through negligence of carrier, he will be liable though act of God immediate cause, 288, 292.

Carrier not excused if he negligently venture forth from place of safety, 288.

Or if he negligently exposes the goods to danger, 292.

Or if his vessel be unseaworthy, 293.

If he deviates from usual course, responsible for any loss arising from any cause, 294, 296.

Whether carrier liable for loss by act of God which would not have occurred but for his unreasonable delay, 297, 307.

How where loss, due to cause excepted by contract, would not have occurred but for the carrier's unreasonable delay, 306.

Effect of unreasonable delay upon insurance, 307.

Act of God will not excuse if carrier has wrongfully refused to deliver goods, 313.

The degree of diligence to be exercised by the carrier when the goods have been overtaken by disaster, 309, 310, 311.

Burden of proof as to carrier's contributory negligence, 312.

Losses arising from acts of public enemy—

Words "public enemy" mean enemy of country to which carrier belongs, 314.

Losses by thieves, robbers, mobs and riots, not within exception, 315, 316.

Loss by "strikers" not within the exception, 316.

Unruly soldiers not public enemies, 316.

Losses by pirates within exception, 316.

When rebellion assumes magnitude of civil war, 317.

Insurrection is not war, 317.

Open declaration of war not necessary to constitute enemy relation, 318.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY LAW*—Losses arising from acts of public enemy—con.*

Existence of actual hostilities sufficient, 318.

To avail himself of this defense carrier must have been guilty of no negligence bringing about capture, 319.

Goods taken by public enemy during deviation, carrier responsible, 319.

Whether carrier may show that loss would have happened without his negligence or deviation, 320, 321.

War acts as legal prohibition upon execution and performance of contract of carriage, 322.

Embargo does not dissolve contract of carriage, 322.

Effect of carriage of contraband goods, 323.

Losses arising from acts of public authority—

Carrier not liable for losses caused by public authority, 324.

But voluntary relinquishment of vessel to government in time of war will not dissolve contracts of affreightment, 324, note 33.

Destruction or injury under police power, 325.

Loss by Confederate authority, 326.

Seizure under legal process, 327.

Exception to liability for act or fraud of owner of goods—

Where owner of goods fraudulently misrepresents their character, carrier not liable for loss, 328, 329.

Failure to disclose real value of package, where outward appearance likely to mislead, amounts to fraud, 330, 331.

And this, whether so intended or not, 330, 331.

Shipper should make known value and character of goods, when, 332.

Carrier not liable for losses caused by intermeddling of owner, or unskillful packing, or inherent defect, 333.

Exception to liability for loss from inherent nature of goods—

Carrier not liable for such loss, 334.

Exception in case of live animals—

Difference between liability of carrier as to goods and animals, 335, 336.

Not an insurer of live stock against consequences of its own vitality, 336.

Carrier does not warrant against inherent nature of animal, as its tendency to unruliness, restiveness, fright, viciousness, kicking, goring, etc., 336, 337, 338.

But carrier liable as insurer of animals, except for losses caused by their peculiar nature, 339.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY LAW

—*Exception in case of live animals*—con.

Cases holding contrary view, 340.

Carrier of animals is common carrier and not special agent of owner, 341.

Though injury caused by peculiar nature of the animals, carrier not excused if he has been negligent, 342.

Carrier liable for injuries to animals due to negligent exposure to cold, 342, note 1.

Duty of shipper to disclose peculiarities affecting risk, 343.

Exceptions made by statute—

Federal statutes limiting liability of seagoing vessels, 344.

Policy of United States courts toward carriers by water changed by Harter Act, 345.

Statute similar to Harter Act in Great Britain, 346.

To what vessels and property Harter Act applies, 347.

Damages for personal injuries to passengers or for loss of baggage not within provisions of Harter Act, 347.

Harter Act only modifies relations between a vessel and her cargo, 348.

Stipulations in bills of lading contrary to section one of Harter Act are void, 349.

Meaning of word "loading" in section one of Harter Act, 350.

"Stowage" used in two senses in section one of Harter Act, 351.

Stowage with a view to the proper trim of the vessel, 352.

Carrier liable if vessel too heavily laden and damage results to cargo, 352.

Responsibility for such stowage rests upon the carrier alone, 353.

Stowage with reference to the natural characteristics of the cargo carried, 354.

Stowage of liquid cargo, 355.

Duty of ship to provide proper dunnage, 356.

Stowage of delicate and easily tainted goods, 357.

Goods should be secured from possibility of shifting, 358.

Proper stowage at commencement of voyage may be made improper by change of vessel's trim during voyage, 359.

Negligence in delivery of cargo within the first section of the Harter Act, 360.

Vessel is liable for failure to deliver at all through master's negligence in overlooking goods, 361.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY LAW

—*Exceptions made by statute*—con.

Second section of Harter Act is the complement of section three, 362.

Effect of sections two and three on the warranty of seaworthiness, 363.

Effect of "due diligence," 363.

Liability for latent defects, 364.

Exemption clauses in bills of lading strictly construed, 365.

The test of seaworthiness, 366.

Burden of proof on carrier to prove vessel was seaworthy or due diligence was used to make her seaworthy, 367.

Warranty of seaworthiness extends to time when vessel actually breaks ground for the voyage, 368.

Vessel must be seaworthy at each stage of the voyage, 368.

Vessel liable for initial instability, 369.

Presumption of unseaworthiness when leaks soon happen in ordinary weather, 370.

Leaking decks or hatches, 371.

Defective rivets or bolts, 372.

Unfastened ports, 373.

Water and steam pipes, etc., 374.

Bulkheads, 375.

Insufficiency of coal, 376.

Defective fog horns, 377.

Deviations in compass, 378.

Vessel should be cleaned and repaired often and well, 379.

What is due diligence, 380.

Vessel owner responsible for acts of his agents, 380.

Proof of inspection of general character insufficient. 380.

Due diligence in manning vessel, 381.

Faults or errors in management of vessel, 382.

Faults or errors in navigation of vessel, 383.

Dangers of the sea, 384.

The inherent defect, quality or vice of the thing carried, 385.

Effect of deviation, 386.

Effect of Harter Act on damages recoverable by cargo owner or on rights of a general average contribution, 387.

EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—

Goods now usually shipped under contract for limited liability, 388.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—con.

Stipulations in bills of lading binding, if such can lawfully be agreed upon, 388.

Rigor of common law rule thereby relaxed, 389.

By common law in England public notice sufficient without express contract, 390-392.

Changed by Carrier's Act, 393-395.

Under Carrier's Act public notice insufficient, 395.

Carrier might limit liability by contract or notice to customer, 395.

Conditions on ticket delivered to shipper sufficient whether read by him or not, 395.

Modified in 1854 by Railway and Canal Traffic Act, 396.

Under latter act, railway and canal companies may limit liability by contract signed by shipper if reasonable and just, 397.

Under either act may stipulate against liability for loss by negligence but not by felonious act, 397.

But language to relieve from negligence must be explicit, 398.

In America, carrier cannot limit liability by public notice or notice to bailor, 399, 406.

May by special contract, 401.

Contract must be express, 402.

Such limitations result from shipper's waiver of common-law liability, 403.

But shipper must be allowed real freedom of choice between restricted or common-law liability, 404.

Actual offer of option unnecessary, 404.

Sufficient if it would have been given on demand, 404.

Limitation of liability by carrier prohibited in some states, 405.

When shipper accepts bill of lading or receipt containing conditions, special contract implied, 406, 407.

Acceptance of carrier's receipt creates a contract according to its terms between him and the shipper, 408.

Failure to read no defense if no fraud practiced, 408.

Burden of proof is on shipper to show that unfair means were resorted to, 408, note 39.

Shipper presumed by accepting receipt to have assented to its conditions, 409.

Some courts, however, hold mere acceptance insufficient, 410.

Rule in Illinois, 410.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—con.

In absence of statute, no particular form of contract limiting carrier's liability is necessary, 411.

Contract need not be in writing, 411.

Unsigned bill of lading may be evidence of the contract actually made, 411, note 3.

Written contract limiting liability may be subsequently modified, enlarged, waived or discharged altogether by parol, 412.

But written contract not providing for a limitation of liability cannot be varied by proof of a custom to vary the contract in such respect, 412, note 5.

Effect of carrier's omission to sign, 412.

Statutory requirements as to signatures, 413.

Distinction between notices limiting common-law liability and those restricting business to particular routes, classes of goods, etc., except on certain conditions, 414.

Notices of latter class binding on shipper, 414.

Terms of limitation must be plain and easily legible—

Must be contained in receipt or written or printed legibly upon its face, 415.

Any attempt at imposition vitiates, if overlooked, 415.

If printed on back of receipt, no evidence in favor of carrier, 415.

Or if limitation is contained in a separate contract, separately signed, 415, note 11.

Or if covered so as to be unintelligible, 415, note 13.

Or if impressed in red ink at right angles to text of paper, 415, note 12.

Or when limitation contained in baggage check handed to passenger in dimly lighted car, 415.

Receipt must be given and accepted at time of acceptance of goods—

Otherwise restricting clauses not binding, 416.

But shipper may afterwards, by conduct amounting to a ratification, adopt the limitations in a contract of shipment, 416.

Effect of agreement or course of dealing to contrary, 416.

Parol agreement acted upon cannot be limited by receipt, subsequently delivered, 417.

Passenger's rights and carrier's liability as to baggage are fixed when his ticket is bought, 417, note 21.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—CON.

Extent to which carrier may limit his liability—

Almost unlimited, 418.

But not against fraud or felony of himself or servants, 418.

Nor in America, against negligence of self or servants, 418.

Carrier may stipulate for exemption from liability for certain losses in carriage of live stock, such as suffocation, heating, and the like, 419.

Consideration for such contracts usually found in reduced rates, 419.

Carrier may stipulate for exemption in case of loss by fire, 420.

But he is liable notwithstanding if he negligently exposes the goods to danger, 420.

Carrier may stipulate for exemption in case of loss caused by strikes, mobs, etc., 421.

Or from thieves, robbers, etc., 422.

Carrier may stipulate for exemption where goods of a dangerous character are accepted for carriage, 423.

Carrier may stipulate for liability of warehouseman while goods are awaiting further conveyance, 424.

If injury or loss occurs from cause for which carrier is not responsible, contract founded on adequate consideration limiting amount recoverable is valid, 425.

Amount must be fixed with regard to real value of goods, 425.

Otherwise if loss occurs through carrier's negligence, owner may recover to full extent of actual loss, 425.

Contracts that goods are of a certain value, or that their value does not exceed a certain sum, and that the carrier's liability shall not exceed that valuation, are valid, 426.

Even where loss occurs through carrier's negligence, 426.

Valuation agreement must be *bona fide* and reasonable, 427.

If owner deliberately places value on goods at carrier's request, he will be estopped from afterwards asserting that their value was more, 428.

Where valuation written on back of contract, it will be considered as notice only, 428.

Ordinarily parol evidence inadmissible to vary express valuation, 428.

But parol evidence is admissible where valuation is ambiguous, or on question of shipper's assent, 428.

Construction of doubtful valuation will be against carrier, 428.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*Extent to which carrier may limit his liability—con.*

Measure of recovery where the loss is only partial, 429.

Conflicting authority on contracts limiting recovery to value of goods at time and place of shipment, 430.

Contracts limiting liability to fixed amount without regard to value of goods of no avail in case of negligence of carrier or his servants, 431.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432.

The same is true if carrier is guilty of a conversion, 432.

Carrier may stipulate in receipt that unless informed of value of goods he will be liable only to limited amount, 433.

Shipper should inform carrier of value of goods and compensate him accordingly, 433, 434.

But knowledge of the character of the goods or previous course of dealing may waive requirement that, unless value of goods is stated, carrier will only be liable to limited amount, 435.

By English Land Carrier's Act liability in some cases limited to £10, 436.

Declaration of value made by shipper conclusive against him under that act, 436.

Shipper is bound to disclose value of the goods when there is a special contract to that effect, 437.

Or when a shipper has notice that a carrier will be liable only to a limited amount unless value is disclosed, 437, 438.

Notice under English Land Carrier's Act, 439, 440.

Some American cases hold notice from previous course of dealing valid, 441.

May limit time within which claims shall be made for loss—

Such conditions usually valid, 442.

Whether action *in rem* against a vessel or *in personam* against the owner is immaterial, 442, note 40.

Condition limiting time within which claim shall be made must be reasonable, 443.

Whether condition was reasonable is ordinarily a question for the jury, 443.

Carrier may waive benefit of such conditions, 444.

What constitutes such a waiver, 444.

Inducing owner to delay presentment of notice, 444.

Acting on verbal notice, 444, note 6.

Going to trial on other defenses, 444, note 6.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*May limit time within which claims shall be made for loss—con.*

Treating claim as pending and rejecting it on other grounds, 444, note 6.

Accepting notices defective in form, 444.

Failure to give necessary information for presentment, 444.

But waiver on prior occasions will not amount to waiver in the later case, 444, note 6.

Nor is there a waiver when it is expressly provided that no agent shall have power to waive, 444.

Condition that claim for damages must be filed in certain time will be construed as referring only to claims for injuries to goods themselves, and not to claims for damages from delay, 445.

Effect of failure to make delivery at all, 445.

Condition no defense to action for misdelivery where carrier falsely asserted he still continued to hold the goods, 445, note 14.

So failure to present a notice of claim within time specified no defense where carrier has been guilty of a conversion, 445.

But stipulation is valid although carrier is holding goods as warehouseman, 446.

Conflict of authority as to question on whom rests the burden of proof, 447.

Some courts hold burden of proof is on owner of goods to show he has complied with the condition, 447.

Some courts hold burden of proof is on carrier to show condition was reasonable and owner's failure to comply with it, 447.

Rule in Illinois, 447.

Carrier may limit time within which suit shall be commenced, 448.

Rule in Kentucky, 448.

Burden of proving loss was within exceptions in contract is on carrier, 449.

But where loss occurs through excepted cause, burden of proving negligence is on owner of goods, 449.

Cannot provide by contract against liability for negligence—

In America, weight of authority against permitting carriers to exonerate themselves from consequences of negligence by contract, 450, 453.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*Cannot provide by contract against liability for negligence*—con.

All courts agree that if exemption from negligence be permitted, exemption must be express and will be construed against carrier, 450.

The rule of the United States Supreme Court, 452.

Contrary rule prevails in New York, 454.

Rule in Illinois, 455.

Stipulation as to amount of proof required amounts to limitation as to negligence and is void, 456.

Power of agent to bind owner of goods by agreement to limitation—

Owner bound by acceptance of receipt by agent, 457.

Authority of carman to bind owner, 457.

Authority of drover to bind owner, 457.

Authority of drayman to bind owner, 457, note 9.

Contract not affected by secret limitations of agents' authority, 457, note 9.

Initial carrier, as agent of owner, has authority to accept reasonable terms of connecting carrier, 458.

But owner not bound by limitation where carrier has notice that authority of agent is restricted, 459.

Although he may adopt the act of his agent, 459.

Powers of agent of carrier to bind him by contract—

Carrier bound by such contracts made by his agent as public have a right to assume, from nature of employment, agent has authority to make, 460.

In England, local or station agent may bind carrier to performance of contract beyond scope of his legal duties, 461.

Public has right to assume that agent of carrier has authority to bind him within scope of his business, 462.

Station agent has implied power to make provision for clearance of customs duties, 462, note 19.

So he has implied power to agree to furnish reasonable number of cars for live stock by a certain date, 462, note 19.

Or that person in charge of animals may ride in stock car, 462.

Verbal contract of shipment entered into by station agent will ordinarily bind carrier, 462, note 19.

Agents of each associated carrier have authority to bind the other carrier, 462, note 19.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*Powers of agent of carrier to bind him by contract—con.*

Effect of circulars sent by carrier to shipper on authority of agent, 462, note 19.

Power of agent of carrier to agree that goods shall be sent by particular boat, 462.

Local usage, unknown to shipper, restricting power of carrier's agents, cannot affect his rights, 462.

In America, carrier's agent may agree to deliver beyond carrier's terminus, 462.

But agent cannot agree to forward freight by passenger train, 462.

What will be construed as a contract exempting from liability for negligence—

Such contract must be so explicit as to leave no doubt as to its meaning, 463.

General language not sufficient, 463.

Meaning of "owner's risk," 463.

Contract against fault of pilot, master or mariners does not include carelessness of mate, 463.

Contract limiting liability construed strictly against carrier—

When contract depends on notice by carrier, or terms and conditions of receipt, ambiguities solved against carrier, 464.

Contract that carrier shall have benefit of insurance on goods construed to cover loss or damage to goods themselves, and not to damage from delay, 464, note 34.

So provision that claim should be filed within certain time does not apply to damages from delay, 464, note 34.

Where carrier gives two notices he is bound by one least beneficial to himself, 464.

When particular risks specifically excepted, followed by more comprehensive terms, former control, 465.

Construction of specific terms not altered to release carrier, 466.

Ambiguous words construed against carrier, 468, 469.

Limitation against negligence of carrier's servants will not extend to personal negligence of carrier, 467, note 2.

How benefit of such contracts can be claimed by connecting carriers—

When first carrier bound by contract or law to carry to destination, succeeding carriers entitled to benefit of protection afforded by his contract, 470-472.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*How benefit of such contracts can be claimed by connecting carriers—con.*

Not so when first carrier mere forwarding agent beyond his own route, 471, 472.

Limitation inures to benefit of connecting carrier only when contract for through carriage exists, 472, 473.

Connecting carrier by taking new and different contract waives benefits of stipulations* in first contract, 472, note 10.

General rules as to limitations of liability—

By what law governed, 474.

Consideration necessary to uphold such contracts, 475.

Recital that rate is less than usual rate not conclusive, 475.

Contract must have a fair construction, 476.

Carrier liable notwithstanding exemption if the loss be the result of his negligence, 477.

Or if loss occasioned by his misfeasance, 478.

Or, though exemption be for losses resulting from delay, if delay is occasioned by negligence, 479.

Or if he departs from the stipulated method of transportation, 480.

Or if he is guilty of a conversion of the goods, 478, note 23.

Or if he discriminates against a shipper in forwarding his goods, 480.

But notorious usage may determine whether there has been a departure from contract, 480.

Sending goods by another route in order to mitigate damages, 480.

Exceptions to liability in bills of lading of carriers by water—

Antiquity of exception against perils of the sea, 481.

Extended to river and other water navigation, 481.

Importance of this exception, 482.

Perils of the sea not synonymous with acts of God or king's enemies, 483.

When collision between vessels a peril of the sea, 483.

Casualty avoidable by reasonable skill and diligence, not within exception, 483, 487.

Mistake of master as to signal lights, 484.

When jettison is a peril of the sea, 485.

Hidden obstructions, 486.

Breaking of rope, 487.

Inrush of water through explosion of blasting caps, 488.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—EXCEPTIONS TO CARRIER'S LIABILITY BY CONTRACT—*Exceptions to liability in bills of lading of carriers by water—con.*

- Rats gnawing hole in water-pipe, 488.
- Ventilators carried away by gale, 488.
- Negligent caulking of hatches, 488, note 56.
- Storm breaking foreboom and parting anchors from chain, 488, note 56.
- Losses by fire not within exception, even where motive power furnished by fire, 488.
- Explosion of boiler not a peril of the sea, 489.
- Escape of steam, 489.
- When loss of cattle is a peril of the sea, 489.
- When motion of vessel is a peril of the sea, 490, note 65.
- Damage from coal dust not a peril of the sea, 490, note 65.
- Injury to vessel from rats, 490, note 65.
- Shipping water, 490, note 65.
- Breaking tiller rope, 490, note 65.
- Desertion of seamen, 490, note 65.
- Burden of proof on carrier to show loss to be within exemption, 490, note 65.
- Carrier liable, notwithstanding exception against perils of the seas, for loss from theft, embezzlement, robbery, mobs, etc., other than pirates, 491.
- Carrier liable, notwithstanding exception against perils of sea, when loss caused by negligence, 492.
- When master neglects usual precautions, 492, note 70.

CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—

Duty to supply himself with necessary appliances—

- General nature of carrier's duty as to transportation, 494, *et seq.*
- First duty to provide himself with proper appliances for transportation, 495.
- Must be reasonably sufficient for purposes of business he undertakes, 495.
- But not bound to provide for extraordinary occasions, or an unusual influx of business, 495.
- Unusual press of business may justify refusal to accept goods, 495.
- Cannot discriminate in favor of one station or shipper, 495.
- On unexpected influx of business, facilities should be equitably apportioned among shippers, 495.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION
OF THE GOODS—*Duty to supply himself with necessary appliances*
—CON.

Common carrier accepting goods, bound to carry within reasonable time, 495, 496.

Must inform shipper of necessary delay, 495, 496.

When bound to carry to destination, must inform shipper of delay on connecting route, 496.

Burden of proof on carrier to show he could not furnish cars needed without jeopardizing other business, 496.

Shipper must give carrier reasonable notice when car required for his exclusive use, 495, note 6.

Duty of carrier then to advise shipper whether car will be furnished, 496, note 7.

Carrier liable if he misleads shipper in that respect, 496, note 7.

Means of transportation must be safe and suitable, 497.

Defect in which will not excuse, 497.

Can guard himself from liability from such cause only by contract, 497.

And generally, when defect can be traced to his negligence, cannot protect himself by contract, 497.

In state where he can so protect himself, contract must be explicit, 497.

If carrier by water, vessel must be seaworthy, 497.

Bound to know condition and fitness of vessel, 497.

Must provide all necessary appliances, 497.

Must provide competent master and crew, 497.

Mere knowledge of defect in vehicle does not amount to assent by shipper, 497, note 15.

Carrier not excused because defective vehicles used by him are owned by another, 498.

Nor can carrier devolve on shipper the duty of inspecting vehicle, 498.

Initial carrier liable for defective vehicle furnished by him, although damage develops on line of connecting carrier, 499.

This true even though initial carrier restricts liability to his own line, 499.

And even if shipper contracts that carrier shall not be liable, 499.

If shipper contracts for special vehicle unsuitable for connecting carrier's line, initial carrier must procure best adapted vehicle possible, 499.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Duty to supply himself with necessary appliances*—con.

Liability of connecting carrier for defective vehicles received by him from initial or another carrier, 500.

Liability of connecting carrier for defective bedding, 500, 509, note 46.

Vehicles must be inspected while in transit, 501.

In selection of vehicles, carrier must guard against exigencies of weather reasonably to be expected, 502.

Duty as to providing appliances for preventing the escape of sparks, 503.

Use of exposed cars, 504.

Duty to furnish refrigerator or ventilated cars, 505.

Icing or re-icing cars, 505.

Use of open or closed cars, 506.

Carriage of cotton on open car, 506, note 40.

Carriage of oil on open car, 506, note 40.

Carriage of precious metals in bullion room of vessel, 507.

How where shipper selects the vehicle himself, 508.

Carrier's duty in furnishing cars for live stock, 509.

Liability of carrier for furnishing cars affected with any contagious disease, 509.

Liability of carrier for furnishing cars with defective stalls or bedding, 509.

Duty of common carrier as to stational facilities, 510.

Duty of common carrier as to providing cattle-yards, 510.

Duty of carrier to provide pens and keep them in repair and order, 510.

Effect of "owner's risk" exemption on carrier's duty to unload live animals, 510, note 52.

Initial carrier liable for injury sustained by animals in pen, although injury does not develop until they have passed into the possession of a connecting carrier, 510.

Duty of carrier to accept goods for transportation, 511.

Must carry for all alike—

Must carry such goods as he is accustomed to carry for all persons alike, 512.

Discrimination by common carrier unlawful, 512.

When mandamus will lie to compel carrier to furnish coal cars, 512, note 59.

When railroad company will be compelled to accept goods at points on a switch, 512, note 60.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

When mandamus will lie to compel railroad company to haul special cars or trains, 512, note 60.

Difference in situation of shippers may justify a preference, 513.

Whether railroad companies are bound to furnish facilities to express companies without discrimination, 514.

Authorities in conflict on this question, 514-516.

The "Express Cases" in the United States Supreme Court, 517.

Right of one express company to use the facilities of another express company, 518.

Giving preference to one connecting carrier over another, 519.

Giving preference to one shipper over another, 520.

Rates must be reasonable, 521.

Must not be unjustly discriminative, 521.

Mere inequality of charges not unjust discrimination, 521.

Secret rebate unlawfully discriminative, 521.

The English rule, 522.

Text of Interstate Commerce Act, 523.

Who are subject to the act, 524.

What shipments are subject to Interstate Commerce Act, 525.

Effect of joint rates in bringing a railroad within the scope of the act, 526.

Commission has power to establish joint rates under certain conditions, 526.

Principal objects of act, 527.

Express adoption of common law, 527.

Act must be construed broadly, 528.

Interests of carrier, shipper and public should be considered, 529.

Interests of public predominant on questions of reasonableness of rates, 530.

Railroad companies cannot graduate charges according to prosperity of industries, 530.

Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.

Weight and bulk of articles should also be considered in fixing a reasonable rate, 531.

Mileage is not the controlling factor in fixing a reasonable rate, 532.

On questions of reasonableness of rates, a comparison of rates is of small importance, 533.

Greater flow of traffic in one direction will justify lower rate in that direction, 533.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

Summer and winter rates may vary, 534.

Second section of Interstate Commerce Act modeled on English Act, 535.

Purpose of second section, 536.

Discriminative interstate contracts void under Interstate Commerce Act, 537.

Even when rates given by mistake, 537.

Discrimination must be unjust, 538.

Milling in transit agreement not necessarily discriminative, 538.

Compressing cotton in transit need not amount to unjust discrimination, 538.

Contract is governed by classification sheet in force at date of shipment, 537, note 39.

Shippers must be placed on an absolute equality, 539.

Special rebates void, 539.

A lower through rate not necessarily discriminative, 540.

Discrimination may be in passenger service, as well as property, 541.

Reasonableness of rate not necessarily involved in section two, 542.

Distinction between wholesale rates in freight and passenger traffic, 543.

Party rates, 543.

Car load usual unit in fixing freight rates, 544.

Rebate equal to cartage charges is discriminative, 545.

Payment of carrier's prior debt by carriage as discrimination, 546.

Agreement for rebate does not void contract of carriage, 547.

Effect of section two on limitations on the value of goods in bills of lading, 548.

Question of relative rates is involved in section two, 549.

Failure to pay expenses no excuse for unjust discrimination, 550.

Third section of Interstate Commerce Act modeled on English act, 551.

Section three embraces every form of unjust discrimination, 552.

Relative rates important under section three, 552.

Questions of undue or unreasonable prejudice or preference are questions of fact, 553.

Origin of goods immaterial under section three, 554.

Carriage of articles or commodities manufactured, mined or produced by carrier, 555.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

Section three applies to timber and manufactured products thereof which are excepted by section one, 555.

Railroad cannot build up one port at expense of another by preferential rates, 555.

Discrimination in carriage of live stock and affording proper facilities under section three, 556.

Discrimination in coal car distribution under section three, 557.

Agreement between railroad company and shippers as to distribution cannot do away with obligations of section three, 557, note 21.

Effect of shipper furnishing cars, 557.

Third section applies as well to passenger as to freight traffic, 558.

Real and substantial completion justifies dissimilarity in rates under third and fourth sections of Interstate Commerce Act, 559.

Third section does not relate to acts, the result of conditions beyond control of carrier, 560.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Interests of shipper, carrier and public should be considered, 563.

Rules as to competition summarized, 564.

Condition that initial carrier shall have right to route beyond its own terminal is valid, 565.

Joint rate is not a basis for local rate, 566.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Discrimination in affording facilities for interchange of traffic, 568.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Railroad need not afford same facilities to rival as to its own branch lines, 568.

Mere distance no criterion of "substantially similar circumstances and conditions," 568.

Company transporting partly by railroad and partly by water not obliged to allow competitor use of its wharf, 568.

Question of similarity or dissimilarity of circumstances under section four is one of fact, 569.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

Real and substantial competition a factor under section four, 570.

"Basing point system" is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Joint rate for long haul should not be less than local rate for short haul, 573.

State legislatures have power to prevent unjust and unreasonable discrimination by carriers operating within the state, 574.

State has right to pass on reasonableness of contract between connecting roads for joint action in transportation of persons or property, 574, note 8.

And has general power to fix a maximum rate, 574, note 8.

But power to regulate is not power to destroy, 574.

Legislature cannot fix maximum rate and then make exceptions to it, 574, note 9.

State regulation must not amount to taking property without due process of law, 574.

State may establish boards or commissioners, 574.

But not with final and exclusive powers, 574.

Illegal excessive rates may be recovered back, 574.

Penal statutes regulating rates are strictly construed, 574.

Power of a state railroad commission to establish rates, 575.

Extent of judicial interference is protection against unreasonable rates, 575.

Rates must first be fixed before courts can interfere, 575.

State has no control over interstate rates, 576.

Reasonableness of a state rate must be determined without reference to interstate business, 576.

Railway companies not entitled to earn the same percentage of profits on all classes of freight carried, 577.

State commission may reduce freight on a particular article, 577.

Burden on carrier to impeach such action of commission, 577.

Reasonableness of state rates should be determined by a study of the rates themselves, 577.

Whether actions or statements of commissioners or governor of state are material, 578.

Mileage as a factor on question of reasonableness, 579.

Comparison of rates as a criterion of reasonableness, 580.

Reasonableness of rates under Uniform Bill of Lading, 580.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

A rate on a single article may be unreasonable, 581.

Exorbitant rates not permissible in order to pay dividends, 581.

Carrier entitled to reasonable profit on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Cost of replacing physical structures too narrow a basis, 583.

How far road's capitalization and bonds should be considered, 583.

Effect of sworn return for purposes of taxation, 583.

Courts should be fully advised of receipts and earnings of a railroad, 584.

Cost of local business is greater than cost of interstate business, 585.

Effect of connecting and branch lines in determining the reasonableness of a rate, 586.

Effect of consolidation of several roads, 586.

A rate, though reasonable, should not tend to create a monopoly, 587.

Discrimination to be actionable must be unjust, 588.

Difference in commodity, or method of handling it, may justify different charge, 588.

A special rate is not always unjustly discriminative, 589.

A "rebilling" rate may be discriminative, 590.

Free passes are discriminative, 591.

An extra charge may be made for shipments received off carrier's own line, 592.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Right of carrier to recover from shipper the difference between the discriminative and regular rate, 594.

Through rate may be less than sum of locals, 595.

Right of state to compel the issuance of mileage tickets at reduced rates, 596.

Discrimination between localities, 597.

Whether competition is a material factor as between localities, 597.

A state may regulate domestic long and short haul rates, 598.

Shipment is an entirety in reference to long and short haul clause, 599.

Special contracts with shippers not impossibilities under long and short haul clause, 600.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Must carry for all alike*—con.

Competition not a factor under Kentucky long and short haul clause, 601.

Duty as to stowage—

General duty as to stowage on vessels, 602.

Effect of shipper's knowledge of negligent stowage, 602, note 17.

Stowage of household goods, 602, note 18.

Effect of failure to provide proper dunnage for sugar, 602, note 18.

Effect of cargo getting "adrift," 602, note 18.

Duty of master of sea-going vessel to stow goods in the hold unless authorized by contract or well-established custom to stow on deck, 603.

Bill of lading silent as to manner of stowage called "clean bill of lading," 603.

Parol evidence not admissible to vary, 603.

Carrier liable for loss of goods stowed on deck without consent of owner, though necessarily jettisoned in storm, 603.

In such case balance of cargo not liable to contribution, 603.

In absence of bill of lading, or when it is silent as to stowage, contract is to stow under deck, 604.

Established usage in particular trade, or of particular class of goods, will justify carriage on deck, 605.

Dangerous goods should be stowed on deck, 605.

So with live animals, 605.

By custom of particular trade lumber may be, 605.

In such case owner entitled to contribution for loss by jettison, 605.

Stowage must be on deck where safety of goods requires, 605.

Notice not to carry in hold must be called to attention of carrier, 605, note 29.

Carrier liable for injuries to goods stowed in hold, when such injuries caused by other goods, without proof of wilful negligence, 606.

If usage to carry salt as part of cargo of general ship, not negligence to take it on board with other goods, 606.

Negligence to take goods on board in such condition as to injure other goods, 606.

Stowing plumbago near cocoanut oil, or flour near kerosene, 606, note 30.

No usage to carry tea and camphor in same vessel, 606, note 31.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Duty as to stowage*—con.

Arsenic may be carried in hold with olive oil, if properly stowed, 606, note 31.

Stowage of goat skins near casks of citron improper, 606, note 32.

Rule requiring stowage under deck confined to ships which sail upon seas and great lakes, 607, 608.

No application to steamboats on rivers, 608.

On last named vessels great care should be taken to prevent exposure to fire, 608.

Vessel liable for injury to goods in discharging cargo, 609.

Stowage upon freight cars of railroad companies, 610.

Goods must be carried in customary mode or according to directions of shipper—

All common carriers bound to carry in customary mode, 611.

Usage may be controlled by direction of owner of goods, 611.

Master will disregard such instructions at his peril, 611.

Accepting goods with directions to carry in particular mode or by particular route, bound to follow such directions, 611.

Carrying in different mode or by different route he becomes insurer, exceptions in contract to contrary notwithstanding, 611.

Marks on goods directing mode of shipment not to be disregarded, 611.

If goods not shipped according to directions carrier liable even though loss occurs on connecting line, 611, note 42.

So initial carrier becomes liable as insurer if goods are delivered to other than designated carrier, or are wrongfully intrusted to another carrier, 611, note 42.

But carrier not liable for deviation from instructions when safety of goods requires it, 612.

Or in effort to mitigate damages after loss or damage on contract route, 612.

So carrier not liable for losses resulting from following directions, 612.

Carrier's duty to transport by usual direct route, 613.

If two routes usual, may select, 613.

Departure, in accordance with general and established usage will not render carrier liable, 613.

Absence of special instructions gives carrier choice, 613, note 53.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Goods must be carried in customary mode or according to directions of shipper—con.*

If one of such routes has become unsafe through accidental or temporary cause, must transport by the other, 614.

Shipper must be notified before carrying by dangerous or unsafe route, 614.

Option as to routes must be exercised with regard to shipper's interest, 615.

Tempestuous weather may render deviation necessary, 616.

Obligation to carry in manner provided by contract—

Carrier contracting to transport in particular manner or prescribed time, held to strict compliance, 617.

Contracting to carry by one ship of certain line, liable for loss if he transports by another of same line, 617.

Express provision of this kind not to be varied by usage, 617.

Contracting to carry by land, cannot carry by water, 618.

Contracting to carry by steam vessel, cannot carry by sail vessel, 618, 619.

Contracting to carry "all rail," cannot carry by steamboat, 618.

So contract to send by sail boat not complied with by sending by steamboat, 619.

If contract is to send by one coach, carrier liable if he sends by another, 619.

Contracting to carry by one sea route, carrier liable if he sends by another more exposed to delay, 619.

Contracting to carry without change of cars, liable for loss if he does change, 620.

Liability of carrier where, notwithstanding an unauthorized deviation, the goods arrive on time, 621.

Consignee cannot refuse to receive them and claim a conversion, 621.

But he may recover such damages as proximately result from such deviation, 621.

Effect of general words permitting deviations used in a printed form, 622.

Construction of clauses reserving leave to tow and assist other vessels, 623.

Carrier not liable if loss occurs through misconception of bill of lading by shipper, 624.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—con.*Goods must be carried at and within time agreed upon—*

Carrier contracting to send goods to destination within prescribed time, not excused by absolute impossibility of performance, 625.

Blockade of port or inevitable accident no excuse, 625, 626.

Nor inability to get goods of particular quality agreed to, 625.

Connecting carrier liable for failure to deliver to succeeding carrier in prescribed time, 625, note 13.

Declaration of duty to carry in a "reasonable" time not sustained by proof of a contract to carry in a prescribed time, 625, note 14.

Effect of loss by storm where there has been a delay by the carrier, 626.

Carrier not excused, where time is prescribed, by circumstances beyond his control, 627.

Loss by freshet, 627.

Shipper must not be in default, 628.

Carrier may agree to hold the goods for transportation until a future date, 629.

Implied authority of agent to agree to furnish cars on given day, 630.

Authority of local and station agents, 630.

Care to be taken of goods during transportation—

In case of accident, carrier must give goods reasonable care and attention, 631-633.

Liable for loss by thieves, when servants standing by, 631.

Master may take cost of reconditioning cargo into consideration, 633.

Carrier must give live stock proper attention as such, 634.

Duty to apply water to over-heated hogs, 634.

Liability when animals die of starvation or thirst, 634.

Carrier should prevent hogs from "piling up," 634, note 36.

Liable if he smothers hog by placing it in steam-heated car, 634, note 36.

In case of accident, should place cars in position where shipper can attend to wants of animals, 634, note 36.

Should assist animals to their feet, 634, note 37.

In absence of special contract, carrier bound to feed and water animals, 634, note 37.

Rule applicable to carriers by water as well as by railroad, 634.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Care to be taken of goods during transportation*—con.

- Initial carrier liable for negligence though injury develops on line of connecting carrier, 634.
- What evidence admissible as to condition of cattle, 634, note 37.
- Injury to cattle from cold, 634, note 37.
- Space for cattle must be sufficiently ventilated, 635.
- Care due pregnant or sick animals, 636.
- Rule in Michigan with reference to caring for live stock, 637.
- Carrier must provide suitable places for feeding and watering live stock, 638.
- Federal 28-hour act, 638, note 49.
- Carrier must take precautions against animals injuring each other in loading or unloading, 638.
- Carrier's duty in the management of vehicles containing live stock, 639.
- Liable for injury through jerks and jars, 639.
- Shipper may assume duty by contract to care for live stock while in transit, 640.
- But he must be given reasonable opportunities and facilities for doing so, 641.
- Request of shipper for opportunities and facilities must be reasonable and necessary, 641.
- Failure of shipper to furnish caretaker does not excuse subsequent negligence of carrier, 642.
- But knowledge by carrier of shipper's omission is essential, 642.
- Carrier liable for his negligence in loading or unloading stock notwithstanding contract that shipper shall do so, 643.
- Same rule true as to shipper, 643.
- Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock, 644.
- Duty of carrier in general to avert injury to goods transported, 645, 646.
- But the carrier is not bound to suspend his voyage to preserve the goods, 647, 648.
- Preference may be given in carriage to perishable goods already received, 649.
- Or to goods intended for some great public need or necessity, as the Chicago fire, 649.
- So preference may be given to preservation of life, 650.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION
OF THE GOODS—*Care to be taken of goods during transportation*
—CON.

- Carrier must complete transportation in reasonable time, 651.
Mere delay in transportation no excuse for abandonment of goods by owner, 651.
And not a conversion, 651.
Damages for delay in transportation of dead body, 651, note 14.
Mere rush of business no excuse for failure to transport with reasonable dispatch, 651, note 14.
Fact that goods are received on Sunday no excuse for unreasonable delay, 651, note 15.
Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.
When initial carrier is liable for negligent delay in delivering to succeeding carrier, 651, note 16.
Mere delay will not sustain action of replevin unless demand for return of goods made, 651.
Owner may recover any reasonable expense occasioned by delay, 651.
What is reasonable time, question of fact, 652.
Inadequacy of loading facilities, 652, note 20.
Carrier bound to transport perishable property immediately, 652, note 20.
Liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.
Negligent delay in transportation of live stock renders carrier liable, 652, note 20.
How far carrier responsible for unavoidable delay, 653.
Unavoidable delay in the shipment of live stock, 653, note 21.
Delay through insufficiency of engines, 653, note 22.
Delay through fall of dew, 653, note 22.
Delay through acceptance of enemies' goods, 653, note 22.
What will excuse delay, 654.
Delay through necessity of repairs, 654.
Delay through snow rendering road impassable, 654.
Washing away of bridge, 654.
Low stage of water, 654.
Freezing of canal or river, 654.
Collision through negligence of another carrier, 654.
Obstruction through negligence of another company, 654.
Destruction of part of road or city by fire, 654.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS—*Care to be taken of goods during transportation*—con.

Atmospheric conditions rendering telegraph wires unavailable, 654.

Washouts caused by unprecedented floods, 654.

Delay through obstructions by ice, 655.

Embargo delays carriage, 655.

Circumstances may make delay a duty, 656.

Delay through strikes, mobs or riots, 657.

Shipper should receive notice from carrier of such delay, 657, note 42.

Carrier must complete carriage where cause of delay removed, 658.

Burden of proof on carrier to show transportation in reasonable time after impediment removed, 658, 659.

Power of owner of goods to change destination—

Bailor may countermand any directions as to consignment so long as he remains owner of goods, 660.

But carrier entitled to full freight for entire distance, 660.

When refusal of carrier to change destination will amount to conversion, 660, and notes.

Right of owner to terminate carriage short of destination, 661.

Carrier may be estopped by usage in such case from demanding full freight, 661.

RIGHTS OF THE CARRIER—

Right of action for loss of or injury to goods—

May recover for injury to goods during bailment, 779.

May recover possession if wrongfully withheld, 779.

Goods stolen from, sufficient to allege property in carrier in indictment, 779.

Carrier's right of action not inconsistent with right of action for same cause by general owner, 780.

But recovery by carrier for full value bars action by general owner, 780.

Carrier recovering full value, trustee for owner, 780.

Satisfaction of judgment for full value passes title to property to party against whom recovery is had, 780.

Carrier paying for property lost or destroyed while in his possession, by wrongful act of another, subrogated to owner's rights, 781.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Right of action for loss of or injury to goods—con.*

May recover possession from carrier if taken from him wrongfully, 782.

Or when he has agreed to hold for party having paramount title, 782.

In trespass or trover against bailor, damages limited to value of special interest, 782.

His right to insure the goods—

When carrier responsible for the goods may insure for full value, 783.

May insure against any particular risk though protected against loss therefrom by his contract, 783.

Suing for full value when not responsible for loss, intention to insure for benefit of owner must appear, 783.

May procure floating policy, 783.

When insurance for full value, trustee for owner, 783.

Carrier may contract with shipper for benefit of any insurance latter may effect on goods, 784.

But cannot insist on such insurance for his benefit as a condition of receiving the goods for carriage, 784.

When insurance company may recover from carrier, 784.

His authority to sell the goods—

Bailment to carrier confers no authority to sell, 785.

Sale by, without other authority, passes no title even to innocent purchaser for full value, 785.

Lien for freight confers no power to sell to satisfy charges and expenses, 786.

When goods stored for charges by carrier with another warehouseman, latter holds for carrier, not for owner, 786.

And goods are then subject to lien of warehouseman as well as to that of carrier, 786.

Extraordinary emergency confers extraordinary power on carrier, 787.

Should sell goods when necessities of case demand, 787.

In such case, sale binding on all parties, 787.

Sale of perishable goods by carrier, 787.

Master of vessel may sell cargo, when, 788.

When inability to make necessary repairs to vessel will justify sale of goods, 788.

Master not absolutely bound to transship, 789.

To establish title purchaser must show necessity of sale, 790.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*His authority to sell the goods—con.*

Whether necessary conditions existed to justify sale a question for the jury, 790.

Sale without necessity a conversion, 791.

Owner of vessel responsible for unjustifiable sale, 791.

Degree of necessity justifying such sale, 792.

Should communicate with owner of goods before sale when practicable, 792.

Sale must be where there is a market and competition, 793.

His right to give away the goods—

Carrier cannot give away the goods, 794.

His right to know character of goods and contents of packages—

Carrier has no right to demand information as to quality of goods or contents of packages, as condition of acceptance, 795.

If goods such as he carries or proposes to carry, can only inquire as to value, 795.

Not bound to transport dangerous goods unless it is his customary or professed business to do so, 796.

When goods dangerous in transportation, duty of shipper to make known such fact, 796.

Carrier may demand knowledge of contents of suspicious packages, 796.

Not liable to shipper for loss occasioned by dangerous character of goods, unless made known to him, 797.

But liable to shippers of other goods for such losses, 797.

Shipper liable to carrier for damages sustained by other shippers through loss occasioned by the carriage of dangerous goods, and paid to them by carrier, 798.

Compensation of carrier—

May demand compensation in advance, and as condition of acceptance of goods, 799.

Or after the performance of services, 799.

Consignor and consignee accepting goods, both liable for freight, 799.

Party liable for freight may set off damages, 799.

But in England carrier may collect full freight, and owner must resort to separate action, 799.

Carrier entitled to freight only for goods actually delivered, 800.

Unless there be clear intent that he be paid lump sum as freight, 800.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Compensation of carrier—con.*

Carrier not entitled to freight if he abandons the goods, 800.

Or if he converts the goods, 800.

Or negligently fails to deliver the goods and reships them to consignor, 800.

Carrier entitled to full freight if prevented by owner from completing journey, 801.

Interruption or delay of journey, while carrier is not at fault, caused by act of God, inclemency of weather, etc., does not justify carrier in terminating it, 801.

Entitled to freight, though goods injured without his fault, 802, 803.

Entitled to full freight when owner elects to receive goods at intermediate place, 802.

Amount of compensation may be fixed by statute, 804.

Or by agreement of parties, 804.

Or by usage, 804.

In absence of these, carrier will be entitled to reasonable compensation, 804.

Offer to carry freight for a certain rate may be withdrawn before acceptance, 804, note 30.

Inability to obtain cars before increased rate becomes operative through no fault of carrier does not relieve shipper from reasonable increase, 804, note 30.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Owner may tender reasonable amount, and bring action against carrier refusing to accept goods, 805.

Consignee may tender reasonable amount and, if refused, bring action for goods, 805.

Or may pay charges and sue for excess over reasonable compensation, 805.

Actual tender in such case not necessary, 805.

Mere intent to collect exorbitant charges not a conversion, 805, note 34.

When freight charges are not voluntarily paid, 805, note 34.

Rights of carrier where low rate has been procured by fraud or mistake, 806.

Who liable for freight—

Consignee presumptively owner and *prima facie* liable for freight, 807.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Who liable for freight—con.*

Consignee accepting goods, promise to pay freight implied, 807.

Consignee not owner not liable for freight unless he accepts goods, 807.

Contract to pay may be implied from previous course of dealing, 807.

Consignee's knowledge that carrier is giving up lien on goods for stated amount does not create obligation to pay charges beyond amount stated, 807.

Consignee indorsing bill of lading not liable for freight unless indorsee his agent, 808.

Implied contract when carrier delivers to assignee of bill of lading, 808.

Presumption that consignee is owner of goods and liable for freight may be rebutted, 809.

No implication of contract of consignee to pay freight when known not to be the owner, 809.

No implication of contract to pay by person in whose care goods are shipped, 809.

Consignee for care merely agent; no title vests in, 809.

Intermediate consignee not liable for freight, when, 809.

Remedy against consignee not exclusive, 810.

Consignee deemed agent of shipper, and latter also liable, 810.

But carrier may treat consignee as the one liable, and thereby discharge consignor's liability, 810, note 53.

Carrier taking note or acceptance of consignee for freight, discharges consignor, 810.

Taking check of consignee dishonored without laches of carrier does not discharge consignor, 810.

Consignee acting as agent liable for freight unless agency known to carrier, 811.

Rule when freight is to be paid by measurement—

Amount of freight estimated by measurement at time of shipment, not delivery, 812.

Calculated on quantity shipped, carried and delivered, 813.

Carrier cannot be gainer by an increase of bulk or weight during voyage, 813.

But may be loser by decrease, 813.

Freight pro rata itineris—

Carrier entitled to, when delivery at original destination waived by mutual consent, 814.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Freight pro rata itineris*—con.

Pro rata freight not payable on property destroyed during voyage, 814, note 2.

Acceptance of the goods, or of their proceeds, by owner must have been voluntary to give carrier claim for *pro rata* freight, 815.

Whether acceptance voluntary, how determined, 815, 816.

Carrier refusing to repair ship after disaster, or to procure another vessel, or refusing to prosecute voyage, acceptance of goods by owner no waiver of further carriage, 816.

Acceptance by agent or supercargo or by underwriter equivalent to acceptance by owner, 816.

Carrier failing to show willingness to complete carriage not entitled to freight *pro rata itineris*, 816.

When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.

Sale without authority, carrier not entitled to compensation, 817.

Not entitled to compensation, if sale through unfitness of vessel to carry goods further, 817.

Or under erroneous decree of court, subsequently reversed, 817.

Or by person assuming to act for owner, but without authority, 817.

Or where transportation to destination becomes impossible, 818.

Rule otherwise in admiralty when transportation of goods prevented by some incapacity in goods themselves, 818.

Carrier's right to *pro rata* freight when carriage interrupted by war, 819.

Rule for adjusting freight *pro rata itineris*, 820, 821.

Transshipment of goods when vessel delayed, 822.

Carrier compelled by emergency to employ another vessel may increase charge for freight, 822.

Carrier so employed has lien on goods for freight, 823.

Lien of substituted carrier only co-extensive with that of first carrier, 823, note 22.

But neither the shipper nor goods bound to original carrier for full freight according to original contract, 823.

Rule in such cases, 823, 824.

Master may act as agent of owner of vessel for making transshipment, 825.

But cannot bind him to pay more freight than was agreed in original contract, 825.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Freight pro rata itineris*—con.

Power to bind owner of goods for increased freight allowed only in case of clear necessity, 825.

When vessel captured by public enemy carrier loses freight and shipper goods, 826.

Goods recaptured and carried to destination, carrier entitled to full freight, 826.

When goods carried contrary to wishes of owner—

Owner of goods not party to contract for carriage not liable for freight, 827.

So when goods carried contrary to express orders of owner, he is not liable for freight, 827.

When carrier may sue for freight—

Not till goods delivered, 828.

But such delivery need not necessarily be actual in all cases, 828.

Right to compensation perfect as soon as whole duty of carrier ended, 829.

When connecting carrier pays charges of initial carrier, right of latter assigned to connecting carrier by operation of law, 828.

When shipper may recover freight paid in advance—

May when goods not delivered, 830.

Local custom to contrary notwithstanding, 830, note 40.

Parol evidence inadmissible to prove contrary, 830, note 40.

Where carrier entitled to apportionment for part performance, can only be compelled to refund part not earned, 830.

Parties may agree that freight may be due before carriage complete, 831.

Consignee liable for detention of carrier—Demurrage—

Meaning of demurrage, 832.

Damages in the nature of demurrage, 832.

Measure of damages in case of improper detention of vessel not fixed and certain, 832.

If vessel not employed, no damages sustained, 832.

Where vessel detained with full crew and cargo, expenses going on, earnings furnish decided assistance in determining damages, 832.

Where demurrage days provided for and a rate of demurrage agreed on, that rate is *prima facie* the standard for measuring shipowner's loss, 832.

Prior agreement as to rate of demurrage not changed by delivery of bill of lading stipulating for different rate by mistake, 832.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

Stipulated rate agreed on for delay in delivering cargo to vessel is *prima facie* evidence of loss by an unexcused delay in loading, 832.

If charterer binds himself absolutely to load or unload within a certain time, he takes the risk of all unforeseen circumstances, 833.

Bears risk of delay from crowded state of harbor, 833.

Or bad weather preventing access to vessel, 833.

Immaterial whether shipowner is also prevented from doing his part of work, unless in fault, 833.

Strike of dock laborers not caused by unreasonable conduct of shipowners will not relieve charterer where absolute promise to pay demurrage, 833, note 47.

Where cargo to be delivered within reach of ship's tackle, charterers not exempted by breakdown of lighter, 833, note 47.

Stipulation for definite lay days makes charterer responsible for loss of machinery for loading by fire, 833, note 47.

Delay through waiting for berth not "a cause or accident beyond the control of consignees," 833, note 47.

Delay caused by actual firing of guns from enemy's ship of war upon forts in harbor not a detention "by default of" charterer, 833.

Clauses in bill of lading providing for special demurrage should be strictly construed, 833.

Even though time for work definitely fixed, charterer or consignee not liable for delay caused by the default of ship-owner, 834.

Consignee not liable for delay due to delivery from one only of two hatches of ship, 834.

Or for delay due to insufficient number of men being hired by ship-owner for his part of work, 834.

Or where stevedoring is done by an employe of the ship's agent, 834.

So ship cannot claim demurrage for delay caused by observance of stipulation inserted for ship-owner's benefit, 835.

Where stipulation that vessel shall be loaded only when she can be kept afloat, time lost in waiting for necessary tides and depth is lost to shipowner, 835.

Rule when delay is due to customs officers, 836.

What are counted as lay days, 837.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

“Days” alone includes all running or successive days, including Sundays and holidays, 837.

When Sundays alone excepted, charterers not exempt from demurrage for holidays and days on which laborers will not work, 837.

Days not excepted on which laborers refused to work owing to storms, 837, note 55.

Or on which labor organizations attended a funeral, 837, note 55.

Or for celebration of Labor day, 837, note 55.

Half holidays not made obligatory by statute usually not excepted, 837, note 55.

“Working days” means running or calendar days on which law permits work to be done, 837.

Excludes Sundays and legal holidays, but not stormy days, 837.

Does not include time taken by baymen in attending funeral, or cessation of work on Good Friday, 837.

When expressions “weather working days” or “with customary dispatch” used, 837.

If vessel commences to load or discharge in middle of day, day’s time is computed at end of that day, and not at expiration of twenty-four hours, 838.

But charter party or bill of lading may provide that demurrage is to run on fraction of a day, 838.

How when only part of a “weather working day” is used on account of weather, 838.

Twenty-four hours may constitute “weather working day” in some places, 838, note 61.

Agreement for “quick dispatch” overrides any customary mode of doing the work, 839.

Under such agreement, demurrage allowable for delay in giving security for freight, 839.

No excuse to show that, by custom of port, vessels took their turn in securing berth, 839.

Agreement to discharge with all dispatch according to custom of port not necessarily same as obligation to discharge in a reasonable time, 839.

Words “as customary” or “with all dispatch as customary” refer to customary manner of doing the work, and not to time for doing it, 839.

Ordinary provision for dispatch in discharging is construed with reference to custom of port where discharge is made, 839.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

"Customary quick dispatch" as to sugar may require platform scales for weighing, 839.

Stipulation for "customary dispatch" fulfilled if customary facilities afforded, 839.

If customary facilities afforded, delay caused by misapprehension of stevedores not chargeable to charterer, 839, note 70.

But "customary dispatch" does not include voluntary delay on part of charterers, 839.

"Customary dispatch" includes usages as to working hours, 839.

As to order in which vessels must come up to wharf, 839.

As to observance of holidays, 839.

But does not include usage as to delay in auction of fruit, 839.

Nor detention to suit the convenience or business purposes of consignor and consignee, 839.

When consignee can use two sides of vessel for loading or unloading he should do so, 839, note 72.

Use of weighers who should be employed in discharging one vessel on other vessels renders consignees liable for demurrage, 839, note 72.

Agreement to load or discharge "as fast as steamer can deliver" not tantamount to fixing certain definite number of days or hours, 840.

Such words not controlled by custom of port fixing rate of discharge at less amount than ship's full capacity, 840.

Charterers liable where only three out of four hatches used, 840, note 1.

Such a clause not affected by weather conditions, even if adverse, 840.

Not complied with by providing wharf at which only one of several hatches can be used, 840.

Weather exceptions in such a clause refer to weather at port of loading or discharge, and not elsewhere, 840.

Competent in charter party to provide exceptions in case of delay, ascribable to specified causes, such as quarantine, flood, storms, strikes, etc., 841.

Courts will give reasonable meaning to exonerating language, 841.

When demand by workmen for an advance in wages is a "strike" within meaning of charter party, 841.

When "strikes" excepted, immaterial that strike was brought

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

- about by demand of charterer that workmen conform to certain reasonable rules and regulations, 841.
- Delay owing to large number of foreign vessels unloading coal on account of domestic shortage caused by strike of miners, not within exception of "strikes," 841.
- Exception against "strikes" not affected by fact that strike is in progress at time contract is signed, 841.
- Drought which does not in any way affect the delivery of cargoes from the place of storage to the ship does not come within exception of "droughts," 841.
- "Political occurrences" which prevent the charterer from procuring a cargo, but not from loading, do not relieve him from liability for demurrage, 841.
- Refusal of captain of port to permit vessel to berth in her turn is an "intervention of constituted authorities," 841, note 12.
- In England exception against "political disturbances or impediments" held to apply to impossibility of keeping railways running owing to civil war, 841.
- When particular exceptions followed by more general and comprehensive words of exception, latter construed to embrace only occurrences *ejusdem generis* with those previously enumerated, unless clear intent to contrary, 841.
- Inability to obtain sufficient number of laborers not *ejusdem generis* with lockout, 841.
- Demurrage, strictly speaking, recoverable only when expressly reserved by charter or bill of lading, 842.
- But when contract silent as to time of loading or discharge, implied obligation arises to load or discharge with reasonable diligence, 842.
- Reasonable time depends upon circumstances, 842, note 15.
- Where contract is silent as to time of discharge, strike will excuse charterer, 842, note 15.
- In absence of custom, reasonable rate not necessarily the same at all wharves and under all circumstances, 842, note 15.
- Failure to fill blanks as to demurrage, rule as to reasonable dispatch applies, 842, note 15.
- Burden on him who seeks to recover damages for delay to prove charterer did not exercise reasonable diligence, 842.
- Proof that vessel was delayed beyond customary time throws on charterer burden of excusing delay, 842.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

To be valid, a custom of a port as to rate of discharge must be certain; cannot fluctuate, 842, note 18.

Diligence at different times cannot be averaged, 842.

Demurrage not allowable for contemplated delays, 843.

Failure of charterer to live up to his agreement to attend to entering of ship at custom house chargeable to him, 843, note 20.

Charterer liable for delay caused by loading and unloading goods erroneously designated as part of cargo, 843, note 20.

Work of loading or discharging a ship usually a joint obligation on part of shipowner and charterer or consignee, 844.

But when work left entirely to third person, or dock company, charterer or consignee, when bound only to reasonable diligence, not liable for delay caused by third person or dock company, 844.

Strict obligation on part of charterer to have cargo ready for loading, 845.

Except where duty to do so has been modified by a controlling usage, 845.

Or has been expressly excused, 845.

When only a chance of berth becoming vacant, there may be no obligation in some cases on part of charterer to have cargo on quay, 845.

On other hand, in some cases it might be the duty of the charterer to prepare the cargo so as to enable the ship to obtain an earlier berthing, 845.

Charterer bound to provide such appliances for loading or unloading as are in ordinary use at the port for the kind of cargo to be handled, 846.

Where only one set of apparatus for unloading is available, a usage of that port controlling that apparatus will be binding on shipowner, 846.

Vessel has the right to assume that dockage for piling cargo will be supplied with reasonable promptitude by charterer, 846.

Rule different as to vessel's rights against a consignor, not a charterer, 846.

Whether shipowner bound to supply electric lights, 846, note 27.

Charterers using every endeavor to procure necessary customary port appliances, not liable for delay in securing those appliances due to causes beyond their control or constituted port authorities, 846.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

"In regular turn" *prima facie* mean regular turn at port of loading, 847.

But it may be shown that words were intended to have a different meaning, 847.

Vessels arriving first entitled to priority in loading, 847.

Custom of local port that vessel should wait her turn is valid, 847.

But usage cannot control express stipulation as to order of being loaded, 847.

Provision that vessel should be loaded by coal company "in turn," not affected by practice of company to give preference to its own customers, 847.

Or to sell coal to local dealers from supply which would otherwise be available for loading, 847.

If bill of lading fails to designate wharf or berth, vessel's right to precedence subject to consignee's designation of wharf, 847.

But consignee not thereby given an arbitrary right, 847.

Special circumstances may be shown to justify the consignee directing vessels, in their turn, to the first berths available, 847.

Necessity of notice of vessel's readiness to receive cargo, 848.

Lay days do not begin to run until such notice given, 848.

Vessel must be ready and at her proper place for loading before notice can properly be given, 848.

In England, master not bound to notify the charterers or consignees of the arrival of the goods, 848.

But in the United States, notice to the charterers or consignees is necessary, even at port of discharge, 848.

Shipowner liable for delay in bringing vessel to berth given her, 848.

Consignee not liable for delay due to vessel arriving on a legal half holiday, 848.

No obligation on part of consignee to keep his office open on a legal half holiday, 848.

Cases in conflict on question of where ship ought to be lying for lay days to commence, 849.

Earlier cases held vessel must be in position where charterer could begin to do his part of the work, 849.

Later cases give a wider latitude to vessel, 849.

If contract is for shipping generally to a certain port, conditions of delivery at public docks must be considered, 849.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

When shipment to party having known special facilities, that fact determines question of reasonableness, 849.

When obligation to deliver at particular dock, voyage not completed until designated place reached, 849.

When vessel to proceed to berth "as ordered," charterer given option in choice of berth, 850.

If strike prevents going to certain berth, charterers not liable for delay in ordering to another berth, 850.

Nor will charterers be liable for delay due to crowded condition of dock, 850.

Two or three hours after notice of arrival is a reasonable time within which to designate berth, 850.

Master may refuse to go to unsafe designated berth, and hold consignee for the delay, 850.

But demurrage not allowable where vessel cannot reach designated berth on account of overloading, 850.

If accident to vessel while waiting on demurrage, obligation to pay demurrage is suspended while vessel is away for repairs, but resumed on her return, 851.

Immaterial that quay berth falls vacant during her absence, 851.

Charterer not liable for delay without his fault after loading completed, 852.

Not liable where vessel frozen in while being loaded, and detained on that account after loading completed, 852.

But charterer liable for detention in loading beyond a reasonable time, although even if loaded on time, ship would have been prevented by ice from sailing earlier, 852.

Consignee by merely accepting goods, does not become liable for payment of demurrage, 853.

But consignee, who is also owner, liable for damages in nature of demurrage when vessel detained at port of discharge unreasonably through his fault, 853.

In such case, nature of damages must be proved, 853.

Liability of indorsees of bills of lading for damages in the nature of demurrage, 853, note 55.

Where consignee fails to take cargo within a reasonable time, he remains liable for damages from undue delay, 853, note 55.

Liability of consignee who accepts bill of lading containing demurrage clause, 853, note 55.

If consignee is owner of goods and enters into contract with

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Consignee liable for detention of carrier—Demurrage—con.*

- carrier, that contract will govern, although shipper stipulates in bill of lading for different rate of demurrage, 853, note 55.
- Rights of master at wharf of assignee of bill of lading do not differ from his rights at wharf of consignee, 853, note 56.
- Effect of "cesser" clause in charter party, 854.
- Cesser and lien clause to be read as co-extensive, 854.
- Shipowner not entitled to demurrage where delay is due to his own default or that of master of vessel, 855.
- Demurrage not allowable where master wrongfully refuses to receive all the cargo contracted for, 855.
- Or where delay occurs through mistaken claim of master that bills of lading are incorrect, 855.
- Consignor liable for demurrage on account of delay caused by refusal of consignee to receive cargo for reasons not connected with some default of carrier, 855.
- Or for delay arising from refusal of consignee to receive cargo because damaged by an excepted peril, 855.
- But consignor not liable for demurrage where refusal of consignee is due to damage through a non-excepted peril, 855.
- Charterer not liable for delay due to master's absence from vessel, 855.
- If master refuses to deliver goods until admittedly extortionate charge for demurrage is paid, consignee may abandon goods, and recover their value, less lawful charges, 855.
- No demurrage allowable for delay through arbitrary stoppage by master until security given, 855.
- Master cannot detain goods on board for non-payment of freight, or general average, and charge demurrage, 855.
- Quasi* demurrage for a reasonable sum might be allowable under such circumstances, 855.
- No lien at common law for demurrage, 856.
- Otherwise by maritime law, 856.
- Lien may be waived, 856.
- *Waivers of claim for demurrage, 857.
- Delivery of cargo and collection of freight money not a waiver of claim for demurrage, 857.
- Presentation of bill for smaller amount not necessarily a waiver of larger claim, 857.
- Nor acceptance of smaller amount by master under protest, 857.
- Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—con.

Railroad companies—Demurrage—

Liability of consignee for detention of cars where duty to unload the goods devolves on railroad company, 858.

Where duty to unload cars devolves on consignee, if he fails to do so, railroad company may demand reasonable compensation for use of its cars, 859.

Term "demurrage," as used by railroad companies, not used in its technical sense, 859, note 20.

What rules of railroad company as to removal of goods by consignee are reasonable, 859, note 20.

Distance freight must be hauled from cars should not be considered, 859, note 20.

When time fixed for consignee to unload has expired, excuses, such as weather, will not avail, 859, note 20.

Initial carrier must actually tender goods to connecting carrier before he can charge demurrage, 859, note 20.

Acceptance of receipt by shipper containing provision for demurrage charge will create a binding contract, 860.

Shipper may be bound by reasonable rule or regulation of railroad company imposing demurrage charge, although no notice of it inserted in receipt or bill of lading, 860.

Reasonable rules and regulations of car service associations will be upheld, 861.

Such associations are not inimical to the public welfare, 861, note 3.

Lien of railroad company on goods to secure charges in the nature of demurrage, 862.

If consignee wrongfully refuses to pay such charges on a carload of lumber, the railroad company may seal the car and place it beyond consignee's control, 862, note 6.

Carrier's right of action for indemnity—

Carrier entitled to indemnity from owner or shipper for loss from dangerous goods imposed on him without his knowledge, 863.

Or from goods being of an illegal character without his knowledge, 863.

Prevented from delivery by fault of owner, entitled to his freight, 863.

Delivery to wrong person and paying true owner, may recover value from person to whom delivered, 863.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Carrier's right of action for indemnity*—con.

Party contracting to supply freight or cargo liable to carrier for damages for failure, 863.

But carrier must use due diligence to procure other freight to complete cargo, 863.

Carrier's lien for freight—

Lien for freight and charges, 864.

Lien nothing more than a right to retain possession of goods until carrier's charges have been paid or tendered, 864.

Owner has no right to demand possession of goods until he has paid or tendered payment for carrier's service and advances, 864.

So, in general, carrier has no right to freight until goods tendered to consignee, 864.

Carrier must be in position to demand freight before lien attaches, 864, note 14.

Carriers by water have lien for their charges the same as carriers by land, 864, note 14.

But carrier by water cannot detain goods on board ship where consignee would have no opportunity of examining their condition, 864, note 14.

Rights of respective owners of a ship and cargo are reciprocal, 864, note 14.

Right to a lien for freight gives a right to a lien upon the ship for due performance of contract for safe carriage and delivery, 864, note 14.

Lien attaches to goods for whole freight carrier would earn as soon as they are delivered to carrier, 865, note 15.

Lien of carrier usually a specific one, 865.

Confined to charges and advances upon particular goods upon which it is claimed, 865.

No right to retain goods for general balance in absence of contract or usage justifying, 865.

But the rule is otherwise where the same vendor, under a single contract of sale, ships several consignments of goods to the same vendee, each shipment embracing several carloads, 865, note 16.

And carriers may by express agreement or long established usage of particular localities, or of particular classes of those engaged in that business, retain goods for general balances, 865.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Carrier's lien for freight*—con.

Lien extends only to charge as carrier, and not as warehouseman, 866.

Extends to expenses necessarily incurred in reconditioning insufficient bags, according to terms of bill of lading, 866, note 18.

But carrier cannot hold goods for debts due himself not connected with the carriage, 866, note 18.

Nor where goods are consigned generally to consignee, for general freight balance against consignor, 866, note 18.

Lien includes legal import duties paid either to government directly or to connecting carrier, 866.

Does not include expenses for warehousing the goods, 866.

Nor to damages arising from a breach of a collateral contract, 866.

In England does not include port charges, 866.

Carrier cannot refuse to deliver until payment of charges for a former shipment is made, 866, note 22.

Lien extends to advances made by preceding carriers, 867.

Final carrier may refuse to deliver until such advances have been paid unless shown by the bill of lading or otherwise, to have been prepaid, 867.

Final carrier need not investigate merit of prior charges which are apparently just, 867, note 24.

If charges are apparently regular, right of final carrier not altered by the mistake or omission of a previous independent carrier, 867, note 24.

Effect of shipping goods "released" or prepaid without notice to last carrier, 867, note 24.

Carrier, however, not authorized to pay every extortionate charge that preceding carriers may see fit to impose upon the goods, 867, note 24.

Connecting carrier need not delay receiving the goods until original contract with owner can be investigated, 867, note 24.

Connecting carrier not liable to preceding carrier for freight charges if goods are destroyed on wharf preparatory to delivery to him, 867, note 24.

Carrier should examine bill of lading, if one accompanies the goods, to see if freight has been prepaid, 867.

If bill of lading silent, and carrier has no information from

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Carrier's lien for freight*—con.

- other sources, he is justified in advancing freight and will be entitled to lien therefor, 867.
- Effect of statement in bill of lading, known to connecting carrier to be erroneous, that freight charges had been prepaid on latter's rights against *bona fide* transferee of bill of lading, 867.
- If carrier contracting to carry goods employs another carrier, latter will be entitled to a lien, 867.
- Unless first carrier has been paid for the service, 867.
- Or unless first carrier had no authority, express or implied, to forward goods beyond his own line, 867.
- Lien of last carrier not affected by fact that previous carrier had been in fault by reason of damage to the goods, 867.
- Mistakes or errors made by first carrier, or any intermediate carrier, in giving directions for forwarding goods, will not affect final carrier's right of lien, 867, note 31.
- If goods carried to wrong destination, or over wrong route, by fault of shipper or his agent, final carrier entitled to his lien, 867.
- Rule where initial carrier, without authority, guarantees a lower through rate to the shipper than the regular rate, 867.
- In such case, right of final carrier to lien for prior charges would depend on whether he had actually paid them, 867.
- When lien on sub-freight may be exercised by shipowner, 868.
- Unconditional delivery by carrier discharges lien, 869.
- Fact that consignee is agent of consignor, and agrees to hold goods until charges are paid, does not alter rule, 869.
- Carrier may deliver, and reserve right to proceed against goods for his freight, 869.
- Or such an understanding may be inferred from plain local usage of particular port, 869.
- If master demands freight immediately on completing the discharge, notice of non-abandonment of lien served at once will preserve it, 869, note 37.
- Intention of carrier to retain lien after delivery of goods not assented to by consignee, insufficient unless supported by local custom or usage to that effect, 869.
- Lien waived when carrier bases his refusal to deliver on other grounds, 869.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Carrier's lien for freight*—con.

- Lien not lost where delivery made to one to whom consignee has made an assignment for the benefit of his creditors, 869.
- Lien in such case follows the fund realized on the property delivered, 869.
- When part of goods delivered, carrier may retain balance till freight on whole consignment paid, 870.
- Partial delivery will not be taken as constructive delivery of whole, or as waiver of lien, unless parties so intended, 870.
- Intention of parties a question of fact, 870, note 42.
- Carrier may demand security for entire freight before delivering any portion of goods, 870.
- Consignee refusing, carrier may store at his expense, 870.
- Carrier cannot insist on payment of freight by parcels, 870.
- Rule different in England where carrier may require freight to be paid upon each parcel as delivered, 870, note 43.
- When delivery procured by trick or fraud of consignee, lien for freight not discharged, 871.
- Or when promise to pay on delivery, which consignee fails to do, 871.
- In such case, carrier may retake possession by writ of replevin, 871.
- Lien of carrier has precedence over claim of general creditor of owner or consignee, 872.
- Or of pledgee who has procured the property to be transported and stored, 872, note 46.
- But lien inferior to that of mortgagee of whose rights carrier had both constructive and actual knowledge before it accepted goods for transportation, 872, note 46.
- Creditor of owner or consignee levying on goods in possession of carrier must pay freight, 872.
- In which case, substituted to lien of carrier, 872.
- Lien of carrier superior to right of stoppage *in transitu*, 872.
- Even after part delivery carrier may maintain his lien for whole charges on balance undelivered, as against vendor's right of stoppage *in transitu*, 872.
- But lien for general balance, good as between carrier and consignee, cannot prevail against vendor's right of stoppage, 872.
- Conditional vendor of goods, who authorizes vendee to ship and use them, estopped from disputing carrier's lien for freight, 873.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—*Carrier's lien for freight*—con.

Lien lost where carrier is liable for damages to goods equal to or exceeding the freight charges, 874.

Lien of carrier may be waived without express agreement to that effect, 875.

Such agreement may be inferred from terms of payment agreed upon, 875.

Lien waived where time for payment postponed to future date beyond time for delivery, 875.

Waived by implication where provision in bill of lading inconsistent with, 875.

Such agreement must be express or implication clear, 875.

Waiver by taking acceptance payable after delivery, 876.

But presumption exists in favor of the existence of the lien, 877.

Terms of special agreement to constitute a waiver must be absolutely inconsistent with retention of goods, 877.

If delivery can be rightfully postponed beyond date for payment of freight, lien not waived, 877.

Particular words in bill of lading construed in favor of existence of lien, 878.

Meaning of "discharge" of vessel, 878.

Effect of failure of freighter where notes given for freight for accommodation of carrier, 878.

Extension of credit no waiver of lien when credit is given on condition that freighter shall furnish security for its payment, or deliver to the carrier bills and notes for the amount, unless condition is fulfilled according to the agreement, 879.

Consignee failing to pay freight, carrier may store at his expense, when, 880.

In such case warehouseman holds for carrier, 880.

Deposit may be made in name of carrier, 880.

Such deposit neither a conversion of the goods nor a discharge of the lien, 880.

Warehousemen liable in such case to carrier as for a conversion of them, and for full amount of his freight, if he delivers the goods without payment of freight, 880.

While holding goods in pursuance of his lien, carrier not an insurer, 881.

Bound to use reasonable care in respect of goods, 881.

[REFERENCES ARE TO SECTIONS.]

COMMON CARRIER—RIGHTS OF THE CARRIER—con.

Whether carrier has lien on goods wrongfully shipped by one who is not owner.

In England, lien attaches in favor of carrier and innkeeper, in such case, 882.

How right of carrier compares with that of innkeeper, 883.

In America, rule different as to carriers, 884.

Rights of connecting road no better in this respect than those of initial carrier, 884.

But lien exists where goods are received from one clothed with apparent authority by owner, 885.

Connecting carrier not to be deprived of his lien because first carrier, by mistake or otherwise, sends goods to wrong place or by wrong route, 885.

Unless he has good reason to know that goods were delivered to him in violation of owner's instructions, 885.

Property of United States government subject to lien like that of private person, 886.

Lien discharged by tender.

Lien is discharged by a tender of performance, when refused by bailee, 887.

Lien not assignable.

Personal privilege, and does not pass by sale or pledge, 888.

Carrier cannot sell goods for his charges.

Sale by carrier, without authority, to enforce lien is a conversion, 889.

If statute exists, sale must be conducted in accordance with and upon notice provided by statute, 889.

COMMON-LAW—

Interstate Commerce Act an express adoption of common-law in some respects, 527.

COMMUTATION TICKETS—

Carrier cannot refuse to sell, to particular individual, 1030.

Surrender of, on last trip, 1038, note 44.

Leaving commutation ticket at home, 1036.

Non-transferable clause in, valid, 1056, note 59.

COMPARATIVE NEGLIGENCE—

Doctrine of, as followed by courts of Illinois, 1175, note 2.

This doctrine now declared to be obsolete, 1175, note 2.

[REFERENCES ARE TO SECTIONS.]

COMPARISON OF RATES—

Of little importance in determining reasonableness of rates under section one of Interstate Commerce Act, 533.

Important under section two of Interstate Commerce Act, 549.

And under section three, 552.

Comparison of rates as a criterion of reasonableness under state statutes, 580.

COMPARTMENTS—

Mere leaks between adjoining cargo compartments ordinarily do not make vessel unseaworthy, 375.

Due diligence to make vessel seaworthy includes diligence to make all compartments fit, 390, note 45.

COMPASS—

Slight deviation in compass will not make vessel unseaworthy, 378.

Presuming on entire accuracy of compass is fault in "navigation" of vessel, 383.

COMPENSATION—

Necessary to constitute one common carrier, 61.

Shipper should inform carrier of value of goods and compensate him accordingly, 433, 434.

Presumed to include consideration for limited liability, 475.

Carrier may demand compensation in advance, and as condition of acceptance of goods, 799.

Or after the performance of services, 799.

Consignor and consignee accepting goods, both liable for freight, 799.

Party liable for freight may set off damages, 799.

But in England carrier may collect full freight and owner must resort to separate actions, 799.

Carrier entitled to freight only for goods actually delivered, 800.

Unless there be clear intent that he be paid lump sum as freight, 800.

Carrier not entitled to freight if he abandons the goods, 800.

Or if he converts the goods, 800.

Or negligently fails to deliver the goods and reship them to consignor, 800.

Carrier entitled to full freight if prevented by owner from completing journey, 801.

Interruption or delay of journey, while carrier is not at fault, caused by act of God, inclemency of weather, etc., does not justify owner in terminating it, 801.

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—con.

Entitled to freight, though goods injured without his fault, 802, 803.

Entitled to full freight when owner elects to receive goods at intermediate place, 802.

Amount of compensation may be fixed by statute, 804.

Or by agreement of parties, 804.

Or by usage, 804.

In absence of these, carrier will be entitled to reasonable compensation, 804.

Offer to carry freight for a certain rate may be withdrawn before acceptance, 804, note 30.

Inability to get cars before increased rate becomes operative through no fault of carrier does not relieve shipper from reasonable increase, 804, note 30.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Owner may tender reasonable amount, and bring action against carrier refusing to accept goods, 805.

Consignee may tender reasonable amount and, if refused, bring action for goods, 805.

Or may pay charges and sue for excess over reasonable compensation, 805.

Actual tender in such case not necessary, 805.

Mere intent to collect exorbitant charges not a conversion, 805, note 34.

When freight charges are not voluntarily paid, 805, note 34.

Rights of carrier where low rate has been procured by fraud or mistake, 806.

Consignee presumptively owner and *prima facie* liable for freight, 807.

Consignee accepting goods, promise to pay freight implied, 807.

Consignee not owner not liable for freight unless he accepts goods, 807.

Contract to pay may be implied from previous course of dealing, 807.

Consignee's knowledge that carrier is giving up lien on goods for stated amount does not create obligation to pay charges beyond amount stated, 807.

Consignee indorsing bill of lading not liable for freight unless indorsee his agent, 808.

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—con.

New implied contract as to freight when carrier delivers to consignee of bill of lading, 808.

Presumption as to consignee's liability may be rebutted, 809.

No implication of contract of consignee to pay freight when known not to be the owner, 809.

Consignee for care merely agent; no title vests in, 809.

Intermediate consignee not liable for freight, when, 809.

Remedy against consignee not exclusive, 810.

Consignee deemed agent of shipper, and latter also liable, 810.

But carrier may treat consignee as the one liable, and thereby discharge consignor's liability, 810, note 53.

Carrier taking note or acceptance of consignee for freight, discharges consignor, 810.

Taking check of consignee dishonored without laches of carrier does not discharge consignor, 810.

Consignee acting as agent liable for freight unless agency known to carrier, 811.

Amount of freight estimated by measurement at time of shipment, not delivery, 812.

Calculated on quantity shipped, carried and delivered, 813.

Carrier cannot be gainer by an increase of bulk or weight during voyage, 813.

But may be loser by decrease, 813.

Freight pro rata itineris—

Carrier entitled to, when delivery at original destination waived by mutual consent, 814.

Pro rata freight not payable on property destroyed during voyage, 814, note 2.

Acceptance of the goods, or of their proceeds, by owner must have been voluntary to give carrier claim for *pro rata* freight, 815.

Whether acceptance voluntary, how determined, 815, 816.

Carrier refusing to repair ship after disaster, or to procure another vessel, or refusing to prosecute voyage, acceptance of goods by owner no waiver of further carriage, 816.

Acceptance by agent or supercargo or by underwriter equivalent to acceptance by owner, 816.

Carrier failing to show willingness to complete carriage not entitled to freight *pro rata itineris*, 816.

When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—*Freight pro rata itineris*—con.

Sale without authority, carrier not entitled to compensation, 817.

Not entitled to compensation, if sale through unfitness of vessel to carry goods further, 817.

Or under erroneous decree of court, subsequently reversed, 817.

Or by person assuming to act for owner, but without authority, 817.

Or where transportation to destination becomes impossible, 818.

Rule otherwise in admiralty when transportation of goods prevented by some incapacity in goods themselves, 818.

Carrier's right to *pro rata* freight when carriage interrupted by war, 819.

Rule for adjusting freight *pro rata itineris*, 820, 821.

Transshipment of goods when vessel delayed, 822.

Carrier compelled by emergency to employ another carrier, may increase charge for freight, 822.

Carrier so employed has lien on goods for freight, 823.

Lien of substituted carrier only co-extensive with that of first carrier, 823, note 22.

But neither the shipper nor goods bound to original carrier for full freight according to original contract, 823.

Rule in such cases, 823, 824.

Master may act as agent of owner of vessel for making transshipment, 825.

But cannot bind him to pay more freight than was agreed in original contract, 825.

Power to bind owner of goods for increased freight allowed only in case of clear necessity, 825.

When vessel captured by public enemy carrier loses freight and shipper goods, 826.

Goods recaptured and carried to destination, carrier entitled to full freight, 826.

When goods carried contrary to wishes of owner—

Owner of goods not party to contract for carriage not liable for freight, 827.

So where goods carried contrary to express orders of owner, he is not liable for freight, 827.

When carrier may sue for freight—

Not till goods delivered, 828.

But such delivery need not necessarily be actual in all cases, 828.

[REFERENCES ARE TO SECTIONS.]

COMPENSATION—*When carrier may sue for freight—con.*

Right to compensation perfect as soon as whole duty of carrier ended, 829.

- When connecting carrier pays charges of initial carrier, right of latter assigned to connecting carrier by operation of law, 828.

When shipper may recover freight paid in advance—

May when goods not delivered, 830.

Local custom to contrary notwithstanding, 830, note 40.

Parol evidence inadmissible to prove contrary, 830, note 40.

Where carrier entitled to apportionment for part performance, can only be compelled to refund part not earned, 830.

Parties may agree that freight may be due before carriage complete, 831.

COMPETITION—

Real and substantial competition a factor in determining rates under Railway and Canal traffic act of 1854, 522, note 31.

Competition between rival routes not a factor under second section of Interstate Commerce Act, 536.

Real and substantial competition justifies dissimilarity of rates under third and fourth sections of Interstate Commerce Act, 559.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Rules as to competition summarized, 564.

Real and substantial competition a factor under section four, 570.

“Basing joint system” is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Whether competition is a material factor as between localities, 597.

Competition not a factor in construction of Kentucky long and short haul clause, 601.

COMPRESS COMPANY (see COTTON)—

Whether possession of cotton by compress company constitutes a delivery to railroad company, 105.

Limitation of liability for loss by fire while cotton is at depots, stations or places of transshipment held not to include loss while in hands of compress company, 464. See also 466.

When cotton not subject to state laws as to compressing, 525, note 8.

[REFERENCES ARE TO SECTIONS.]

COMPRESS COMPANY—con.

Compressing cotton in transit not necessarily discriminative under Interstate Commerce Act, 538.

Carrier may contract with compress company for the insurance of cotton for his benefit, 783, note 15.

CONCURRENT NEGLIGENCE—

Liability in case of, to passenger, 917.

CONDITION OF GOODS—

Recital in bill of lading as to condition of goods, how far conclusive as to, 163-166.

CONDITIONAL SALE—

Right of conditional vendor to delivery of goods from carrier, 752, note 39.

Conditional vendor of goods, who authorizes vendee to ship and use them, estopped from disputing carrier's lien for freight, 873.

CONDUCT—

Of passengers, right of passenger carrier to regulate in depots, 943.

CONDUCTOR—

Authority of, to accept passengers on freight train or engine, 964.

Duty of conductor to protect passenger, 980, *et seq.*

Authority of, to eject trespassers, 990, note 20.

CONFEDERATE AUTHORITY—

Carrier not liable for seizure of goods by, 326.

See WAR; PUBLIC ENEMY; PUBLIC AUTHORITY.

CONFISCATION—

Of ticket by carrier, 1056.

CONFLICT OF LAWS—

By what law the effect of a contract is to be determined, 199.

The rights arising out of the contract must be created by law, 200.

Lex loci contractus will govern in the great majority of cases, 201.

When performance wholly within one state, the law of that state governs, 202.

Matters relating solely to delivery may be determined by law of place of delivery, 203.

In actions against carriers of goods, same law governs whether the form of action is *assumpsit* or tort, 204.

[REFERENCES ARE TO SECTIONS.]

CONFLICT OF LAWS—con.

In actions for personal injuries against carriers of passengers, *lex loci delicti* governs, 205.

Contributory negligence governed by same law, 205.

Proof of *lex loci delicti* must be made, 205.

Rights created by foreign law should be enforced elsewhere, 206.

Exceptional rule in federal and New York courts, 206.

Proof should be made in court of forum of what the foreign law is, 207.

Matters relating to remedy are governed by law of the forum, 208.

A state may require care and diligence of carrier, although contract is one for interstate carriage, 209.

Better rule is that performance of contract of carriage is indivisible, 210.

Some states hold performance of contract divisible, and rights of parties to be construed by law of place where negligent breach occurs, 211.

Lex loci contractus generally governs validity of limitations of carrier's liability, 212.

Presumption exists that that law applies which is most favorable to the validity of the contract, 213.

Facts extrinsic of presumptive evidence may be considered by the court to determine what law governs, 214.

Enforcement of limitation, valid in one state, by courts of another state, 215.

Rule in United States courts, 215.

Rule in Texas, Nebraska, Kentucky and Pennsylvania, 215.

Enforcement of limitation valid at place of contract, valid at destination and valid at forum, 216.

Enforcement of limitation valid at place of contract, invalid at destination and valid at forum, 217.

Enforcement of limitation valid at place of contract, invalid at destination, and invalid at forum, 218.

Enforcement of limitation valid at place of contract, valid at destination and invalid at forum, 219.

Enforcement of limitation invalid at place of contract, valid at destination and valid at forum, 220.

Enforcement of limitation invalid at place of contract, invalid at destination and valid at forum, 221.

Enforcement of limitation invalid at place of contract, valid at destination, and invalid at forum, 222.

[REFERENCES ARE TO SECTIONS.]

CONFLICT OF LAWS—con.

Enforcement of limitation invalid at place of contract, invalid at destination and invalid at forum, 223.

Proof must be made of what the foreign law is, 224.

Rights of action under statutes for death by wrongful act, enforcement of, in other states, 1387, 1388, 1390.

What law governs as to effect of contributory negligence or of a release on right of recovery, 1393.

What law governs as to time limitations in actions for death by wrongful act, 1396.

CONNECTING CARRIERS—

Common Carriers—

Who is a connecting carrier, 247.

When way-bill or directions from initial carrier necessary to attach liability of common carrier to connecting carrier, 112, note 23.

Liability of connecting carrier begins as soon as he commences to remove goods from conveyance of another carrier, 124.

Unless bound to carry to destination, first carrier discharged when goods safely delivered to next succeeding carrier, 129.

Duty of first carrier to effect such delivery, 130.

Must at least make a tender of delivery, 130.

Failure to deliver to designated connecting carrier a conversion, 130.

Duty of initial carrier when goods are perishable, 130.

Duty of initial carrier to transmit instructions or conditions as to goods to succeeding carrier, 130, 140.

As to owner, actual change of possession necessary to shift responsibility to succeeding carrier, 131-137.

How when succeeding carrier refuses or neglects to receive goods, 132.

How duty to make delivery to a succeeding carrier affected by usage, 133.

As between carriers, constructive delivery may be sufficient, 134.

But as to owner of goods, doctrine of constructive delivery has no application, 134.

Carrier whose duty it is to make delivery presumed to be in possession until contrary shown, 134.

Delivery by railroad company to steamship company on wharf of latter, 136.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Common carriers*—con.

Owner may recover of connecting carrier to whom goods have been constructively delivered, 138.

First and each succeeding carrier agent of owner for purpose of delivery to next succeeding carrier, 139.

Each liable for loss for failure to deliver to next succeeding carrier, 139.

Carrier cannot become warehouseman of goods while in transit, 141, 142.

Where bill of lading silent as to connecting line, initial carrier may select any usual and direct route, and parol evidence inadmissible to show another was intended, 168.

But such right of initial carrier may be modified by a subsequent parol agreement, 170.

Connecting carrier should ascertain the consignee, and deliver to him only, 177.

Carrier not bound by law to assume liability beyond terminus of his own line, 226.

But carrier may contract to carry beyond terminus of his own line, 226.

What circumstances necessary to show contract by carrier to assume liability beyond his own line, 227.

Rule in Muschamp's case as to liability beyond his own route, 228, 229.

In England, carrier accepting goods directed to destination beyond his own route responsible for carriage to that place, and succeeding carriers not, 228, 229.

English rule prevails in many states, 230.

English rule denied in majority of states, 231.

This conflict more apparent than real, 232.

Liability beyond terminus may be excluded by contract, 233.

Even when liability fixed by statute, 234.

Interstate Commerce Act makes initial carrier liable, 235.

Intermediate carrier may still be held directly liable, 236.

Early Georgia cases held first carrier exclusively liable, 236.

Carrier may contract for exclusive transportation, 237.

What constitutes such a contract, 238, 239.

Extent to which carrier may limit his liability under contract for through carriage, 240.

Implied powers of agents to make such contracts, 241.

Local freight agent may have such authority through usage, 241.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Common carriers*—con.

No distinction between corporations and other carriers in respect to power to enter into contracts for through carriage, 242.

No liability for loss beyond his own line under contract to carry to end of line and there to deliver to next carrier, 243.

Undertaking "to forward," how construed, 244, 245, 246.

Authority of contracting carrier to bind connecting carrier by contract, 248.

Partnerships and associations between carriers, 249-264.

When exist and liabilities under, 249-264.

Carrier may stipulate for liability as warehouseman while goods are awaiting further conveyance, 424.

Initial carrier, as agent of owner, has authority to accept reasonable limitations of connecting carrier, 458.

Agents of each associated carrier have authority to bind the other carrier, 462, note 19.

When first carrier bound by contract or law to carry to destination, succeeding carriers entitled to benefit of protection afforded by his contract, 470-472.

Not so, when first carrier mere forwarding agent beyond his own route, 471, 472.

Limitation inures to benefit of connecting carrier only when contract for through carriage exists, 472, 473.

Connecting carrier by taking new and different contract waives benefits of stipulations in first contract, 472, note 10.

When carrier bound to carry to destination, must inform shipper of delay on connecting route, 496.

When delay occurs through inability to deliver to connecting carrier, shipper must be notified, 496, note 9.

Initial carrier liable for defective vehicle furnished by him, although damage develops on line of connecting carrier, 499.

This true even though initial carrier restricts liability to his own line, 499.

And even if shipper contracts that carrier shall not be liable, 499.

If shipper contracts for special vehicle unsuitable for connecting carrier's line, initial carrier must procure best adapted vehicle possible, 499.

Liability of connecting carrier for defective vehicles received by him from initial or another carrier, 500.

Liability of connecting carrier for defective bedding, 500.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Common carriers*—con.

Initial carrier liable for injury sustained by animals in pens, although injury does not develop until they have passed into the possession of a connecting carrier, 510.

Giving preference to one connecting carrier over another, 519.

Carrier need not advance money to all other carriers on same terms, nor give credit to all other carriers because he gives credit to others, 519.

Under section twenty of Interstate Commerce Act initial carrier cannot restrict his liability to his own line, 235, 523.

Condition that initial carrier shall have right to route beyond its own terminal is valid under Interstate Commerce Act, 565.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Connecting carrier does not have to pay mileage on cars of another carrier, when it has cars of its own available, 568.

State has right to pass on reasonableness of contract between connecting roads for joint action in transportation of persons or property, 574, note 8.

If goods not shipped according to instructions carrier liable even though loss occurs on connecting line, 611, note 42.

So initial carrier becomes liable as insurer if goods are delivered to other than designated carrier, or are wrongfully intrusted to another carrier, 611, note 42, 617, note 62.

Connecting carrier liable for failure to deliver to succeeding carrier in prescribed time, 625, note 13.

Implied authority of local agent to contract for delivery of car to connecting carrier on a given day, 630.

Initial carrier liable for injury to live stock, although injury develops on line of connecting carrier, 634.

When connecting carrier is liable for negligent delay in delivering to succeeding carrier, 651, note 16.

Carrier liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.

Massachusetts and New Hampshire rules as to delivery by railroad companies do not apply to delivery between connecting carriers, 706.

Mere acceptance of cars by connecting carrier from another carrier does not amount to a ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Common carriers*—con.

When connecting carrier pays charges of initial carrier, right of latter assigned to connecting carrier by operation of law, 828.

Initial carrier must actually tender goods to connecting carrier before he can charge demurrage, 859, note 20.

Carrier's lien includes legal import duties paid to connecting carrier, 866. *

Carrier's lien extends to advances made by preceding carriers, 867.

Final carrier may refuse to deliver until such advances have been paid, unless shown by the bill of lading, or otherwise, to have been prepaid, 867.

Final carrier need not investigate merit of prior charges which are apparently just, 867, note 24.

If charges are apparently regular, right of final carrier not altered by mistake or omission of a previous independent carrier, 867, note 24.

Effect of shipping goods "released" or prepaid without notice to last carrier, 867, note 24.

Carrier, however, not authorized to pay every extortionate charge that preceding carriers may see fit to impose upon the goods, 867, note 24.

Connecting carrier need not delay receiving the goods until original contract with owner can be investigated, 867, note 24.

Connecting carrier not liable to preceding carrier if goods are destroyed on wharf preparatory to delivery to him, 867, note 24.

Carrier should examine the bill of lading, if one accompanies the goods, to see if freight has been prepaid, 867.

If bill of lading silent, and carrier has no information from other sources, he is justified in advancing freight and will be entitled to lien therefor, 867.

Effect of statement in bill of lading, known to connecting carrier to be erroneous, that freight charges had been prepaid, on carrier's rights against *bona fide* transferee of bill of lading, 867.

If carrier contracting to carry goods employs another carrier, latter will be entitled to a lien, 867.

Unless first carrier has been paid for the service, 867.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Common carriers*—con.

Or unless first carrier had no authority, express or implied, to forward goods beyond his own line, 867.

Lien of last carrier not affected by fact that previous carrier had been in fault by reason of damage to the goods, 867.

Mistakes or errors made by first carrier, or any intermediate carrier, in giving directions for forwarding goods, will not affect final carrier's right of lien, 867, note 31.

If goods carried to wrong destination, or over wrong route, by fault of shipper or his agent, final carrier entitled to his lien, 867.

Rule where initial carrier, without authority, guarantees a lower through rate to the shipper than the regular rate, 867.

In such case, right of final carrier to lien for prior charges would depend on whether he had actually paid them, 867.

Rights of connecting carrier as to lien where goods wrongfully shipped by one who is not owner are no better than those of initial carrier, 884.

Connecting carrier not to be deprived of his lien because first carrier, by mistake or otherwise, sends goods to wrong place or by wrong route, 885.

Unless he has good reason to know that goods were delivered to him in violation of owner's instructions, 885.

Presumptions as to losses where goods carried by several connecting carriers, 1347, 1348, 1349.

Passenger carriers—

Liability of connecting passenger carriers for heating the car, 922, note 13.

Coupon ticket does not usually import contract of through carriage, 1049.

Carrier issuing through ticket for transportation on route of connecting carrier, agent for latter, when, 258-261, 1048, 1049.

Not responsible for safety of passenger beyond his own line, 1049.

Or baggage beyond his own line, 1049.

Holder of coupon ticket may stop at end of each line represented by coupons, and resume within a reasonable time, 1049.

This rule has been extended to cases where passengers hold tickets having separate coupons for different divisions of same line, 1049.

[REFERENCES ARE TO SECTIONS.]

CONNECTING CARRIERS—*Passenger carriers*—con.

But contract for through carriage may be made, 1050.

Railroad may, by its advertisements, treat entire journey over its own and connecting lines as entire trip for which it alone would be responsible, 1050, note 25.

Railroad selling trip over connecting line to real terminus of its own road liable for negligence of connecting line, 1050, note 25.

Railroad operating another line cannot escape responsibility for negligence by showing charter did not authorize such operation, 1050, note 25.

Whether through contract exists is question of fact, 1050.

Parol evidence of real contract admissible, when, 1050, 1052.

When nothing shown but sale of ticket; presumption that carrier is responsible for his route alone, 1050.

When net profits divided among successive carriers, liable as partners, 1050.

When initial carrier liable for connecting carrier's failure to provide stateroom, 1050, note 29.

When connecting road bound by statements of foreign ticket agent, 1060, note 9.

When limitation of liability inures to benefit of, 1071.

Placing baggage in common baggage room not delivery to, 131, note 13.

Delivery of baggage to wrong connecting carrier, liability of preceding carrier for, 1282.

Delivery of baggage to wrong connecting carrier, liability of connecting carrier, 1283.

CONNECTING LINES (See CONNECTING CARRIERS)—

Effect of, in determining the reasonableness of a rate, 586.

CONNECTING STAGE-COACHES—

Liability of, for loss of baggage, 260, 261.

CONNIVANCE—

Seizure of goods under legal process to be an excuse for non-delivery must not have been brought about by connivance of carrier, 745.

CONSIDERATION (See REDUCED FARE)—

Undertaking to carry a sufficient consideration in declaring against mandatory, 18, 34.

Reward is consideration of carriage by private carrier by hire, 35.

[REFERENCES ARE TO SECTIONS.]

CONSIDERATION—con.

For contracts limiting liability of common carrier usually found in reduced rates, 419.

Consideration necessary to uphold limitations of liability by common carrier, 475.

CONSIGNOR AND CONSIGNEE—

Consignee is presumptively the owner of the goods, 177.

If consignor retains ownership, carrier should be notified, 177.

When consignment may be changed by shipper, 193-196.

When consignor or consignee may sue for breach of contract, 197.

A selection of unsuitable cars by consignor will bind consignee, 508, note 43.

Carrier should require proof of identity of consignee, 668.

Delivery to consignee, though a swindler, 669, *et seq.*

Whether acceptance of goods at another place is a waiver of a misdelivery, 678, note 44.

Consignee of goods delivered by carrier by water should remove goods within a reasonable time, 694.

When consignee may return damaged goods, 734.

Consignee's right to change the place of delivery, 735.

Consignee cannot change destination when known to be mere agent, 736.

Consignor and consignee accepting goods, both liable for freight, 799, 807.

If carrier, not being in fault, prevented by consignor or consignee from completing journey, he is entitled to full freight, 801.

Consignee *prima facie* liable for freight, 807.

Consignee not owner not liable for freight unless he accepts goods, 807.

Contract to pay may be implied from previous course of dealing, 807.

Consignee's knowledge that carrier is giving up lien for stated amount does not create obligation to pay charges beyond amount stated, 807.

Consignee indorsing bill of lading not liable for freight unless indorsee his agent, 808.

Implied contract when carrier delivers to assignee of bill of lading, 808.

Presumption of consignee's liability may be rebutted, 809.

[REFERENCES ARE TO SECTIONS.]

CONSIGNOR AND CONSIGNEE—con.

- No implication of contract of consignee to pay freight when known not to be the owner, 809.
- No implication of contract to pay freight by person in whose care goods are shipped, 809.
- Consignee for care merely agent; no title vests in, 809.
- Intermediate consignee not liable for freight, when, 809.
- Remedy against consignee not exclusive, 810.
- Consignee deemed agent of shipper, and latter also liable, 810.
- But carrier may treat consignee as the one liable, and thereby discharge consignor's liability, 810, note 53.
- Carrier taking note or acceptance of consignee for freight, discharges consignor, 810.
- Taking check of consignee dishonored without laches of carrier does not discharge consignor, 810.
- Consignee acting as agent liable for freight unless agency known to carrier, 811.
- No obligation on part of consignee to keep his office open on a legal half holiday, 848.
- Consignee, by merely accepting goods, does not become liable for payment of demurrage, 853.
- But consignee, who is also owner, liable for damages in nature of demurrage when vessel unreasonably detained through his fault, 853.
- In such case, nature of damages must be proved, 853.
- Where consignee fails to take cargo within a reasonable time, he remains liable for damages from undue delay, 853, note 55.
- Liability of consignee who accepts bill of lading containing demurrage clause, 853, note 55.
- If consignee is owner of goods and enters into a contract with carrier, that contract will govern although shipper stipulates in bill of lading for different rate of demurrage, 853, note 55.
- Consignor liable for demurrage on account of delay caused by refusal of consignee to receive cargo for reasons not connected with some default of the carrier, 855.
- Or for delay arising from refusal of consignee to receive cargo because damaged by an excepted peril, 855.
- But consignor not liable for demurrage where refusal of consignee is due to damage through a non-excepted peril, 855.
- Liability of consignor or consignee for detention of cars of railroad company beyond a reasonable time see DEMURRAGE.

[REFERENCES ARE TO SECTIONS.]

CONSIGNOR AND CONSIGNEE—con.

Carrier cannot hold goods where consigned generally to consignee, for general freight balance against consignor, 866, note 18.

Right of consignor or consignee to sue for damage to goods, 1308-1320.

See ACTIONS AGAINST CARRIERS.

Cannot refuse to receive injured goods, 1365.

But may, where entire value of goods destroyed, 1365.

CONSOLIDATION—

Of several roads, effect on question whether a rate is reasonable, 586.

CONSTRUCTION OF BILL OF LADING OR CONTRACT—

Contract to increase or lessen responsibility of private carrier for hire must be clear and explicit, 40.

In case of repugnancy, written clauses will prevail over printed clauses, 165, 233, note 23.

Construction should be upon a consideration of the whole instrument, 165.

Effect of blanks in bill of lading, 177, note 35.

Language of contract must be clear to have carrier held liable for act of God, 266, 267.

Exemption clauses in bills of lading strictly construed under Harter Act, 365.

Contract of exemption must be express, 402.

Construction of doubtful valuation will be against carrier, 428.

Condition that claim for damages must be filed in certain time will be construed as referring only to claims for injuries to goods themselves, and not to claims for damages from delay, 445.

All courts agree that if exemption from negligence be permitted, exemption must be express and will be construed against carrier, 450.

Ambiguities in limitations of bill of lading construed against carrier, 464.

Contract that carrier shall have benefit of insurance on goods construed to cover loss or damage to goods themselves, and not to damages from delay, 464, note 34.

So provision that claim should be filed within certain time does not apply to damages from delay, 464, note 34.

Where carrier gives two notices, he is bound by one least beneficial to himself, 464.

[REFERENCES ARE TO SECTIONS.]

CONSTRUCTION OF BILL OF LADING OR CONTRACT—con.

When particular risks specifically excepted, followed by more comprehensive terms, former control, 465.

Construction of specific terms not altered to release carrier, 466.

Ambiguous words construed against carrier, 468, 469.

Limitation against negligence of carrier's servants will not extend to personal negligence of carrier, 467, note 2.

Contract limiting liability must have a fair construction, 476.

Effect of general words permitting deviations used in a printed form, 622.

Construction of clauses reserving leave to tow and assist other vessels, 623.

Carrier not liable if loss occurs through misconstruction of bill of lading by shipper, 624.

Clauses in bill of lading providing for special demurrage should be strictly construed, 833.

Construction of exception in charter party, 841.

Particular words in bill of lading construed in favor of existence of carrier's lien, 878.

CONSTRUCTION OF STATUTES—

Interstate Commerce Act should be construed broadly, 528, 560.

Penal statutes regulating rates are strictly construed, 574.

CONSTRUCTION OF TICKET—

Construed against carrier, 1052.

CONSTRUCTION TRAIN—

Taking passage on, 930, 1000.

CONSTRUCTIVE DELIVERY (See DELIVERY)—

CONTAGIOUS DISEASE—

Liability of carrier for furnishing cars affected with any contagious disease, 509.

Non-delivery of goods by carrier excused if they are infected with contagious disease, 756.

Passenger having, may be isolated, 1160, note 11.

Carrier may refuse passenger having, 966.

CONTEMPLATED DELAYS—

Demurrage not allowable for, 843.

CONTENTS—

Carrier not presumed to know condition of contents of packages or vessel brought to him, 163.

[REFERENCES ARE TO SECTIONS.]

"CONTENTS UNKNOWN"—

Effect of these words in bill of lading, 165, 166.

CONTINUOUS CARRIAGE (See CONNECTING CARRIERS)—

Of freights under section seven of Interstate Commerce Act, 523.

CONTINUOUS TRIP—

Ticket presumed to be for, 1041.

How in case of coupon ticket, 1048, *et seq.*

CONTRABAND GOODS—

Effect of carriage of, 323.

CONTRACT (See CARRIER; CARRIER WITHOUT HIRE; PRIVATE CARRIER FOR HIRE; COMMON CARRIER; PASSENGER CARRIER; BAGGAGE; BILL OF LADING; CONFLICT OF LAWS; CONSTRUCTION OF BILL OF LADING OR CONTRACTS)—

Better rule is that performance of contract of carriage is indivisible, 210.

Some states hold otherwise, 211.

CONTRIBUTORY NEGLIGENCE—

Of contributory negligence generally, 1170.

Person injured through his own fault cannot recover of another, 1170.

Application of rule to carriers, 1171.

Liability of carrier to persons not passengers, 1171.

Negligence of passenger will not always protect carrier from liability, 1172.

Negligence of passenger no excuse to carrier where, after becoming aware of passenger's exposed position, carrier fails to exercise reasonable care to avert injury, 1173.

Negligence of passenger in stepping from moving train no excuse to carrier for leaving him exposed in helpless condition upon track, 1173, note 1.

Negligence of passenger in refusing to leave crowded boat at request of carrier's servants, no excuse to carrier for attempting to make trip with boat loaded beyond its capacity, 1173, note 1.

Hand, placing of, by passenger where it is likely to be caught by closing of car door, no excuse to carrier where servant, with knowledge of position of passenger's hand, heedlessly closes door, 1173, note 1.

Passenger walking upon or near track, chargeable with contributory negligence, 1173, note 1.

Where facts in dispute, question of contributory negligence is for jury, 1174.

[REFERENCES ARE TO SECTIONS.]

· CONTRIBUTORY NEGLIGENCE—con.

Where facts not in dispute, but are such that different conclusions may fairly be drawn from them, question of passenger's negligence is for jury, 1174.

When a question of law, 1175.

When facts not in dispute, and are such that there can be no reasonable difference of opinion but that plaintiff's negligence contributed to injury, question of defendant's liability one of law for court, 1175.

Comparative negligence, doctrine of, as followed by courts of Illinois, 1175, note 2.

This doctrine now declared to be obsolete, 1175, note 2.

Elevator, passenger on, when guilty of contributory negligence will be barred from a recovery, 100, note 41.

Questions of mixed law and fact, 1176.

Alighting from train while in motion, 1177.

View that voluntary attempt by passenger to alight from train which he knows to be in motion is a negligent act *per se*, 1177.

Whether passenger does or does not know that train is in motion is a question for jury, 1177, note 2.

Mere fact that train fails to stop as promised by conductor, no excuse to passenger for attempting to alight, 1177, note 3.

Fact that to remain on train will subject passenger to trouble or inconvenience, no excuse to passenger for attempting to alight, 1177.

But where passenger is invited or directed to alight from moving train by an agent acting in line of his duty, and danger is not obvious, his conduct will not be *per se* negligent, 1177.

Under such circumstances, question of passenger's contributory negligence is for jury, 1177.

Brakeman, with authority to assist passengers to alight, has authority to direct passenger, being carried past his station, to alight, 1177, note 4.

But such direction must be more than mere advice or information, 1177, note 4.

Where conductor violently threatens to eject passenger, negligence of passenger in attempting to alight from moving train will be excused, 1177, note 4.

But where passenger is expressly warned not to alight, his conduct in doing so will be negligence, 1177, note 4.

Burden of proof, on passenger, to show facts excusing his conduct in alighting from train while in motion, 1177, note 4.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

View that attempt by passenger to alight from train while in motion is not necessarily a negligent act *per se*, 1179.

This view sustained by weight of modern authority, 1179.

Under this view, question of passenger's contributory negligence, in attempting to alight from moving train, is ordinarily one of fact for jury, 1179.

Circumstances attending act must be looked to, 1179.

Act of passenger, in attempting to alight from moving train, not excused where danger in doing so is great or obvious, 1180.

Snow and ice, passenger jumping from moving car upon, chargeable with contributory negligence, 1180, note 10.

Female passenger in enfeebled condition, attempting to alight from moving car, chargeable with contributory negligence, 1180, note 10.

Female passenger, weighing 200 pounds, attempting to alight from moving train, chargeable with contributory negligence, 1180, note 10.

Passenger excused where he reasonably believes he is exposed to peril, and that it is necessary for his safety, 1180.

Getting on train while in motion, 1181.

View that voluntary attempt by passenger to board moving train, contributory negligence *per se*, 1181.

Fact that passenger is induced by considerations of personal convenience to attempt to board moving train, no excuse, 1181.

Refusal of employees to stop train according to custom, no excuse to passenger for attempting to board it, 1181.

Refusal to stop train as required by law or published schedules, no excuse to passenger for attempting to board it, 1181.

Practice of railway company of receiving passengers while train in motion, no excuse to passenger for attempting to board it, 1181.

But passenger may be justified in attempting to board moving train where he is induced to do so by some act or direction of company's agent, 1181.

Station agent has no authority to direct passenger to board moving train, 1181, note 14.

Where passenger directed by conductor to board moving train, question of passenger's contributory negligence is for jury, 1181, note 14.

Train running from four to six miles an hour, passenger attempting to board, chargeable with contributory negligence, 1181, note 14.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

View that attempt by passenger to board train while in motion is not necessarily a negligent act *per se*, 1182.

Under this view, question of passenger's contributory negligence, in attempting to board train while in motion, is ordinarily one of fact for jury, 1182.

This view sustained by weight of modern authority, 1182.

Circumstances attending act of passenger must be looked to, 1182.

When a question of law, 1182.

Train running four miles an hour, not negligence *per se* for strong able bodied man to attempt to board, 1182, note 16.

Train running five miles an hour, passenger attempting to board, chargeable with contributory negligence, 1182, note 16.

City ordinance providing for punishment of any person getting on or off railway train while in motion, not within police power of city, 1182, note 16.

City ordinance providing for fine of any person, not in employ of railroad company, who jumps on or off train while in motion, void as unreasonable attempt to regulate rights of passenger and carrier, 1182, note 16.

Negligence of passenger in boarding train while in motion no excuse for pushing him from platform of car, 1183.

Leaving or entering train elsewhere than on station platform where one is provided, 1184.

Where railway company has provided platform, negligence for passenger to get on or off on opposite side, 1184.

Or for passenger to fail to avail himself of such facilities, 1184.

Passenger rushed from platform by crowd of impatient passengers, not chargeable with contributory negligence for attempting to board train from opposite side, 1184.

Passenger who voluntarily leaves depot platform and stands between tracks, chargeable with contributory negligence, 1184, note 21.

Effect of carrier's acquiescence or directions, 1185.

Custom established by railway company of putting off passengers on side opposite depot platform, passenger leaving train on that side not chargeable with contributory negligence, 1185.

But passenger must have had knowledge of custom, 1185.

Alighting from train on side opposite depot platform, not negligence *per se* where passenger is directed to do so by conductor, 1185.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- Steps, placed by conductor on side opposite depot platform, passenger using, not chargeable with contributory negligence, 1185, note 26.
- Leaving or entering train at place where no platform is provided, 1186.
- Passenger voluntarily attempting to alight at place where no facilities are provided, chargeable with contributory negligence, 1186.
- But where custom established by railway company of discharging passengers at place where no platform is provided, passenger alighting in accordance with, not chargeable with contributory negligence, 1186.
- Passenger alighting away from depot platform, not chargeable with contributory negligence when directed to so alight by agent acting in line of duty, 1186.
- Custom established by railway company of receiving passengers at place other than depot platform, passenger attempting to board train in accordance with, not chargeable with contributory negligence, 1186.
- Under such circumstances, question whether passenger chargeable with contributory negligence, for jury, 1186, note 32.
- Negligence in railway company to leave ground where passengers are in habit of boarding train, in dangerous condition, 1186.
- Passenger injured by falling into pit near customary landing place at night, not chargeable with contributory negligence, 1186.
- But evidence that some people have boarded train at point away from depot platform, not sufficient to establish custom, 1186, note 32.
- Passenger attempting to board train at point away from depot platform, not chargeable with contributory negligence when invited to do so by agent acting in line of employment, 1186.
- Passenger attempting to alight at unusual place when train has stopped short of or has overshot platform, chargeable with contributory negligence, 1187.
- Circumstances excusing such conduct, 1187.
- Calling name of station, as excuse, 1187.
- Invitation to alight by carrier's servant, as excuse, 1187, note 35.
- Passenger using way for leaving or entering vehicle not intended for that purpose, chargeable with contributory negligence, 1188.
- Passenger going around freight train to reach depot, chargeable with contributory negligence, 1188.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- Gangway reserved for freight, passenger voluntarily using, chargeable with contributory negligence, 1188.
- Baggage car, passenger entering train through, chargeable with contributory negligence, 1188.
- Freight car, passenger getting upon to pass to caboose, chargeable with contributory negligence, 1188.
- Custom established by railway company of permitting passengers to leave train by other way than that provided, passenger leaving train in accordance with, not chargeable with contributory negligence, 1189.
- Alighting from steps of vehicle when danger obvious, 1190.
- Passenger, in alighting, should observe where he is stepping, 1190.
- Small bench, placed too far away from car steps, negligence for passenger to attempt to alight by means of, 1190.
- Jumping from upper steps of car, held negligence, 1190.
- Passenger using ways for entering or leaving depot not intended for that purpose, chargeable with contributory negligence, 1191.
- Passenger making use of customary way which is temporarily dangerous, 1191.
- Passing from car to car while train in motion, not contributory negligence unless danger is obvious, 1192.
- Passenger voluntarily passing from car to car when train in rapid motion, chargeable with contributory negligence, 1192.
- Passing from car to car when train in motion, not contributory negligence when passenger invited to do so by agent acting in line of duty, 1192.
- Passenger passing from car to car when train in motion in search of water to drink, not chargeable with contributory negligence, 1192.
- Passenger passing from car to car when train in motion, not chargeable with contributory negligence where train provided with vestibules, unless danger obvious, 1193.
- Passenger voluntarily occupying exposed position upon vehicle, chargeable with contributory negligence, 1194.
- Passenger voluntarily sitting beside open window through which sparks are entering, chargeable with contributory negligence, 1194.
- But not, where danger not reasonably to be anticipated, 1194, note 23.
- Passenger voluntarily riding on top of caboose, chargeable with contributory negligence, 1194.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- Passenger voluntarily swinging body beyond outer surface of moving car, chargeable with contributory negligence, 1194.
- Effect of carrier's acquiescence or directions, 1195.
- Where passenger invited or directed by servant, acting in line of duty, to occupy exposed position on vehicle, he will not be chargeable with contributory negligence unless danger obvious, 1195.
- Platform of car, riding on, by invitation of carrier's servants, not negligence, 1195.
- Hurricane deck of vessel, going upon by direction of officer, not negligence, 1195.
- Caboose, riding upon top of, by order of conductor, not negligence, 1195.
- Occupying exposed position, no bar to recovery where it does not contribute to injury, 1196.
- Occupying exposed position, no bar to recovery if accident which occasioned injury would have been attended with same result, no matter upon what part of vehicle passenger was, 1196.
- Passenger voluntarily and without necessity standing on platform of car while train in motion, chargeable with contributory negligence, 1197.
- Passenger standing on platform of car while train in motion, after request by conductor to go inside, chargeable with contributory negligence, 1197, note 34.
- Passenger standing on platform of car while train in motion, in violation of company's rules, which are known to him, chargeable with contributory negligence, 1197, note 34.
- Interurban car, passenger voluntarily standing on platform of, while in motion, chargeable with contributory negligence, 1197, note 34.
- Modern improvements have largely modified risk of standing on platform while car in motion, 1197, note 35.
- Standing on platform while car in motion, no bar to recovery where it does not contribute to injury, 1197.
- Standing on platform while car in motion, not contributory negligence where passenger is invited or directed by company's servants to do so, 1197.
- But where danger is obvious, invitation or direction by company's servants, no excuse, 1197.
- Where passenger is invited or directed by company's servants to

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- stand on platform of moving car, question of passenger's negligence is for jury, 1197.
- Standing on platform while car in motion, not necessarily contributory negligence where passenger is induced to do so by conduct of carrier's servants, 1197.
- Under such circumstances, question whether passenger was negligent, one of fact for jury, 1197.
- Standing on platform while car in motion, whether contributory negligence, held, question for jury, 1197, note 37.
- Standing on platform of moving car when car full, not contributory negligence as a matter of law, 1198.
- But passenger must exercise for his safety, when so obliged to ride upon platform, a degree of care commensurate with the danger, 1198.
- Notice forbidding passengers to ride on car platform, deemed waived when passengers received, and there is not sufficient room inside, 1198, note 39.
- Seat, passenger unable to obtain, within car, cases holding he will be justified in riding on platform, 1198.
- Better rule is that if there is standing room within car, passenger should avail himself of it, 1198.
- But passenger not required to disregard usual courtesies of life in order to secure place within car, 1198.
- Standing on platform of moving car, not contributory negligence where passenger justified in believing he cannot get inside without unreasonably pushing and crowding his way, 1198.
- Direction by conductor to go within car should be obeyed, 1198, note 42.
- Passenger made sick by conditions within car, not negligence for him to go upon platform, 1198, note 42, 1199.
- Standing on platform of moving car in order to better escape impending danger, not negligence as a matter of law, 1199.
- Baggage car, riding in, voluntarily and unnecessarily will be contributory negligence, 1200.
- Baggage car, riding in, by direction of company's authorized agent, not contributory negligence, as a matter of law, 1200.
- Baggage car, going into, to consult conductor on legitimate business, not contributory negligence as a matter of law, 1200, note 1.
- Baggage car, riding in, no bar to recovery where it in no manner contributes to injury, 1200.
- Baggage car, going into, to better escape impending peril, question

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- of passenger's contributory negligence, one of fact for jury, 1200, note 3.
- Baggage car, going into, no defense for unwarranted assault by company's servants, 1200, note 3.
- Baggage car, passenger riding in, according to his habit, with knowledge of conductor, not guilty of contributory negligence, 1200.
- Postal clerk, off duty, riding in baggage car according to custom, not *per se* negligent, 1200, note 4.
- Baggage car, riding in, against rules of company, held not contributory negligence where conductor has knowledge of passenger's presence in car and makes no effort to remove him, 1200.
- Better rule is that such conduct will bar passenger's right to a recovery if he is thereby injured, 1200.
- Baggage car, person collusively agreeing with baggage-master to ride in, cannot recover of company for being forced from car by baggage-master while train in motion, 1200.
- Baggage car, rule of company against riding in, company may waive benefit of such rule, 1200.
- Show car, riding in, when will be contributory negligence, 1201.
- Stock car, stockmen voluntarily and unnecessarily riding in, chargeable with contributory negligence, 1202.
- Stock car, stockman riding in, not chargeable with contributory negligence where entire duty of caring for stock is assumed by him, and contract does not require him to ride in caboose, 1202.
- Stock car, stockman riding in, not chargeable with contributory negligence when so riding in pursuance of contract, 1202.
- Stock car, stockman riding in, not chargeable with contributory negligence when so riding in pursuance of custom, 1202.
- Stock car, stockman riding in, in violation of terms of contract, chargeable with contributory negligence, 1202.
- Tops of cars, stockman voluntarily and unnecessarily passing over, while train is in motion, chargeable with contributory negligence, 1203.
- Tops of cars, stockman passing over, while train in motion, not chargeable with negligence as a matter of law where custom established for stockmen to do so, 1203.
- Tops of cars, stockmen passing over, while train in motion, in violation of terms of contract, chargeable with contributory negligence, 1203, note 16.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

- Engine, stockman unnecessarily riding on, assumes increased hazards incident to that position, 1204.
- Engine, stockman riding on, when conduct will be excused, 1204.
- Hand car, riding on, 1205.
- Interfering with management of vehicles, 1206.
- Warning, failure of passenger to give, to engineer, of impending collision, not contributory negligence, 1206.
- Suggestion by passenger to driver of road vehicle that he is getting out of track, no excuse to carrier for injury caused by driving out of road in dark, 1206.
- Using unsafe platforms on depot premises, 1207.
- Omission to look for obstructions placed by carrier upon depot platform, not necessarily contributory negligence, 1207.
- Using other parts of platform than those lying immediately between entrance thereto and place intended for passengers to board train, not contributory negligence, 1207.
- If passenger makes use of platform which he knows to be in dangerous condition, a failure to exercise care proportioned to risk will be contributory negligence, 1207.
- Exposed position upon railway company's premises, contributory negligence for passenger to occupy, 1208.
- Limbs, passenger projecting, from car window, chargeable with contributory negligence as a matter of law, 1209.
- This view supported by weight of authority, 1209, 1210.
- Extent of protrusion immaterial, 1209.
- Limbs, passenger projecting, from car window, view that question of passenger's contributory negligence is for jury, 1211, 1212, 1213.
- Limbs, passenger projecting, from car window, no defense to carrier where it does not contribute to injury, 1214.
- Head, passenger protruding, through car window, contributory negligence as a matter of law, 1215.
- No excuse that passenger was irresistibly compelled to vomit, 1215, note 16.
- Passenger standing in car while in motion, not chargeable with contributory negligence, 1216.
- Passenger may leave his seat in car for any reasonable purpose, 1216, note 1.
- Whether passenger standing in car while train in motion chargeable with contributory negligence, usually a question for jury, 1216, and note 5.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

Passenger standing in car while train in motion, must exercise for his safety such care as situation demands, 1216, note 5.

Freight train, passenger riding on, care to be exercised by, 1217.

Freight train, passenger riding on, assumes those risks that are ordinarily incident to its proper management, 1217.

Freight train, passenger riding on, bound to exercise for his safety a degree of care commensurate with increased dangers ordinarily incident to its proper management, 1217.

Failure of passenger to exercise such care will be contributory negligence, 1217.

Seat, in caboose, passenger sitting on arm of, chargeable with contributory negligence, 1217.

Chair, in caboose, passenger sitting tilted back in, chargeable with contributory negligence, 1217.

Seat, in caboose, passenger lying down in, so that head is likely to bump against frame work, chargeable with contributory negligence, 1217.

Caboose, standing in, when in motion, usually contributory negligence, 1217.

But circumstances may excuse passenger's conduct in standing in caboose when in motion, 1217.

Leaving seat in caboose to get drink of water, not contributory negligence as a matter of law, 1217, note 14.

Standing in caboose, not contributory negligence when seats full, 1217, note 14.

Rising from seat of caboose and moving toward door after name of station called, not contributory negligence, 1217, note 14.

Lumber car, passenger riding on, not necessarily chargeable with contributory negligence, 1217, note 15.

Engine, passenger who unnecessarily rides on, although invited by engineer or fireman, chargeable with contributory negligence, 1218.

Fact that conductor has knowledge that passenger is riding on engine, no excuse, 1218.

Engine, brakeman has no authority to invite one to ride, 1218, note 16.

Tender or footboard of engine, passenger riding on, chargeable with contributory negligence, 1218.

Crossing tracks to reach or leave cars, 1219.

General rule that person, before crossing railway track, must stop, look and listen, 1219.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

But passenger, invited by carrier to cross railway track, in order to reach or leave cars, not bound to stop, look and listen for approaching trains, 1219.

Rule does not extend to protection of passenger who attempts to cross track at time when no invitation held out to him to do so, 1219.

Notice to passengers not to cross intervening track, carrier may waive, 1219.

Passenger, although invited to cross intervening track, must exercise ordinary care for his safety, 1219.

Passenger crawling under trains to reach cars, chargeable with contributory negligence, 1220.

How far negligence of passenger excused by directions of carrier or his servants, 1221.

Directions of carrier's authorized agent will ordinarily excuse passenger's conduct, unless such directions lead to known and obvious danger, 1221.

But to excuse conduct of passenger, directions by agent must have been given while acting within scope of employment, 1222.

Where life of passenger in imminent peril, passenger may rely on directions of agent ordinarily without authority to direct passengers, 1222.

Passenger endeavoring to escape peril produced by negligence of carrier, not chargeable with contributory negligence, 1223.

But to justify passenger in encountering danger to escape such peril, there must be reasonable cause for alarm, 1224.

Fear of slight injury, not sufficient to justify passenger in encountering risk of greater injury to avoid it, 1224.

Conduct of passenger, in endeavoring to escape peril, must be viewed in light of circumstances as they appeared to him at time he sought to escape, 1224.

Evidence of what other passengers said and did in excitement of moment, properly admissible, 1224, note 3.

Avoiding an inconvenience to which the negligence of the carrier has exposed the passenger, 1225.

If inconvenience so great that it is reasonable to get rid of it by an act not obviously dangerous, passenger, in ridding himself of it, not chargeable with contributory negligence, 1225.

Negligence of passenger on one kind of vehicle may not be so on another, 1226.

Contributory negligence as affected by infancy of passenger, 1227.

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

Infant, same care and caution not exacted of, as in case of adult, 1227.

Old, lame and infirm, no greater degree of care required of, than capacity of person will allow, 1227.

Children, when negligence will be imputed to, 1228.

Whether child chargeable with contributory negligence, question for jury, 1228.

Imputability of the negligence of those who have infants and imbeciles in charge, 1229.

View that the negligence of parent or guardian is to be imputed to child, 1229.

This view adopted by the English courts, 1229.

Better rule is that the negligence of person who has child in charge is not to be imputed to child, 1229.

But where the negligent parent or guardian seeks to recover in his own right for injury to child, his negligence will be a defense, 1229.

Intoxication does not *per se* constitute contributory negligence, 1230.

Intoxicated person, same degree of care required of, as is required of passenger who is sober, 1230.

Intoxication no bar to a recovery where it does not contribute to injury, 1230.

Intoxication, whether proximate cause of injury, question for jury, 1230.

Where carrier accepts person as passenger with knowledge that he is so intoxicated as to be physically and mentally incapable of avoiding danger, question of contributory negligence cannot arise, 1230.

How contributory negligence affected by the blindness or deafness of the passenger, 1231.

Sunday, passenger traveling on, in violation of statute, no defense in action for negligence, 1232, 1233.

Passenger wrongfully ejected from train or negligently carried beyond destination, care to be exercised by, 1234.

Under such circumstances, presence on track not contributory negligence, 1234.

But passenger must leave track at earliest practicable opportunity, 1234.

Passenger negligently carried beyond destination, who seeks to

[REFERENCES ARE TO SECTIONS.]

CONTRIBUTORY NEGLIGENCE—con.

return by way of railway track, chargeable with contributory negligence, 1234.

Whether negligence of passenger's carrier can be imputed to him when passenger injured by concurrent negligence of another, 1235.

Under former English rule of *Thorogood v. Bryan*, passenger regarded as so far identified with his carrier as to make him a sharer in carrier's negligence, 1235.

English rule generally denied in United States, 1236.

English criticism of the rule, 1237.

Final overthrow of rule in England, 1238.

Burden of proof on defendant to show passenger's contributory negligence, 1417.

View that burden of proof is on plaintiff to show that he was free from negligence, 1418.

To defeat recovery, plaintiff's negligence must have been proximate cause of injury, 1419.

How question of contributory negligence determined, 1420.

Where facts in dispute, or such that reasonable minds may fairly arrive at different conclusions as to plaintiff being chargeable with contributory negligence, question is for jury, 1420.

Where facts admitted, and these facts so clearly show that plaintiff's own negligence contributed to injury that there can be no reasonable difference of opinion in regard to it, question of defendant's liability, one of law for court, 1420.

Child's contributory negligence, effect of, on parent's action, 1381.

Parent's contributory negligence, effect of, on own action, 1382.

Husband's contributory negligence, effect of, on wife's action, 1382.

Wife's contributory negligence, effect of, on husband's action, 1382.

Deceased's contributory negligence, effect of, on action for causing his death, 1391.

Beneficiary's contributory negligence, effect of, on action for wrongfully causing death of deceased, 1392.

CONVENIENCE (See INCONVENIENCE) —

Consignee cannot leave goods in hands of railroad company until it suits his convenience to remove them, 713, and notes.

"Customary dispatch" does not admit of detention to suit convenience of consignor and consignee, 839.

[REFERENCES ARE TO SECTIONS.]

CONVERSION—

- Unauthorized delivery of goods to third person by carrier without hire a conversion, 26.
- A failure of the initial carrier to deliver to designated connecting carrier deemed a conversion, 130.
- Acceptance of goods in good faith from, and delivery to, person not owner but in apparent control is not a conversion, 148.
- But taking by mistake other goods than those he is directed to take may be a conversion, 148.
- If carrier is guilty of a conversion, he is liable for full value of goods, and not for stated value, 432.
- So failure to present a notice of claim within time specified is no defense where carrier has been guilty of a conversion, 445.
- Carrier liable notwithstanding limitation of liability if he is guilty of a conversion of the goods, 478, note 23.
- Carrier cannot refuse to receive goods and claim a conversion, where, notwithstanding unauthorized deviation, goods arrive on time, 621.
- Mere delay not a conversion, 651.
- When consignee may elect to sue as for a conversion after negligent delay and demand has been made and delivery refused, 651, note 16.
- When refusal of carrier to change destination of goods at request of owner will amount to a conversion, 660.
- Qualified refusal of carrier to deliver goods until identity of owner is established is not a conversion, 668.
- But delivery to a wrong person is a conversion, 668.
- When delivery at wrong place is deemed a conversion, 680.
- Carrier cannot be held liable as for conversion in failing to give notice of the refusal of the consignee to receive the goods, 721, note 21.
- Delivery of C. O. D. goods without exaction of amount due a conversion, 727.
- Withholding goods upon demand from party entitled to them a conversion, 752.
- Not conversion to hold long enough to satisfy honest doubt as to true ownership of goods, 753.
- Sale of goods by carrier without necessity a conversion, 790.
- Carrier not entitled to freight if he converts the goods, 800.
- Mere intent to collect exorbitant charges not a conversion, 805, note 34.

[REFERENCES ARE TO SECTIONS.]

CONVERSION—con.

After failure of consignee to pay freight, deposit of goods by carrier with warehouseman, not a conversion of the goods, 880.

When warehouseman liable to carrier as for a conversion, 880.

Sale by carrier, without authority, to enforce lien is a conversion, 889.

Of goods by carrier, must account to owner for amount he receives, 1361.

So long as goods remain in specie, owner must accept them, and can recover only damages sustained by the delay, 1372.

Acceptance of goods by owner after unreasonable delay, no waiver of right to recover damages, 1372.

Measure of damages for conversion of goods, value at place of destination, with interest, less cost of transportation, 1374.

Tender of goods by carrier after a conversion, may be shown in mitigation of damages, 1374.

Payment to owner by person to whom carrier has wrongfully delivered goods, may be shown in mitigation of damages, 1374.

CORPORATE NAME—

Permitting another carrier to use its corporate name may render carrier allowing its use liable as a partner, 264, note 23.

CORPORATIONS—

No distinction between corporations and other carriers in respect to power to enter into contracts of through carriage, 242, 264.

Delivery of goods consigned to corporation before actual incorporation, 678, note 43.

Responsible for negligence or incompetency of servants, 960.

When constructively present at act of servant, 960.

CORPSE (See DEAD BODY)—

CORROSION—

May show lack of due diligence on part of vessel-owner in cleaning and repair of vessel, 379.

COTTON (See COMPRESS COMPANY)—

Liability of common carrier for loss of cotton, 53, note 10.

Not delivered to railroad company where still in possession of compress company and under the latter's control, 106.

Delivery of cotton to railroad company by placing it on platform erected for that purpose, 115, note 33.

Delivery of cotton in street near platform or in cotton yard in accordance with custom, is sufficient, 115, note 33.

[REFERENCES ARE TO SECTIONS.]

COTTON—con.

- Delivery of cotton to carrier where cars are loaded on side track, 125.
- When liability of initial carrier terminates, 131.
- Carriage of cotton on open car, 506, note 40.
- Delivery of cotton to carrier at switch instead of at regular station, 510, note 51.
- When cotton not subject to state regulations as to compressing, 525, note 8.
- Compressing cotton in transit not necessarily discriminative under Interstate Commerce Act, 538.
- Discrimination in forwarding of cotton, 597, note 11.
- Loss by fire, 608.
- Sending cotton by other than designated vessel through default of shipper, 628.
- Loss of cotton by fire after notification of arrival by carrier by water to consignee, 694, note 24.
- Carrier may contract with compress company for the insurance of cotton for his benefit, 783, note 45.
- Rule when freight for cotton is to be paid by measurement, 812.

COUNTERFEIT MONEY—

- Paying fare or buying ticket with, 1026.
- Charging passenger with passing, 1099, note 34.

COUNTERMAND—

- Bailor may countermand any directions as to consignment so long as he remains owner of the goods, 660, 193 *et seq.*
- Generally consignee may direct delivery at place other than that appointed by consignor, 735.
- But not where title vests in consignee on performance of certain conditions, 735.
- Consignee cannot change destination when known to be mere agent, 736.
- Change cannot be made after transportation completed, 737.

COUPLING—

- Defect in, is negligence, 504.
- Liability of passenger carrier for misplaced coupling pins, 911.

COUPON TICKETS—

- When must be used, 1048, *et seq.*
- Do not usually make contract for through carriage, 1049.
- Coupons not good if detached, 1055.
- How, if detached by accident or mistake, 1055.

[REFERENCES ARE TO SECTIONS.]

COUPON TICKETS—con.

Against whom action must be brought by passenger, 1053.
Tearing off wrong coupon, 1059, 1065, note 29, 1064.

CRAWLING UNDER TRAINS—

To reach or leave cars, contributory negligence, 1220.

CREDIT—

Extension of credit no waiver of lien, when, 879.

CREDITORS—

Right of stoppage *in transitu* not defeated by attachment or garnishment by creditors of consignee, 763.

Lien of carrier has precedence over claim of general creditor of owner or assignee, 872.

Creditors of owner or consignee levying on goods in possession of carrier must pay freight, 872.

In which case, substituted to lien of carrier, 872.

Amount recovered in actions for death by wrongful act usually free from claims of, 1402.

. CREW—

What is due diligence in obtaining a competent crew, 381.

Desertion of, not a peril of the sea, 490, note 65.

Shipowner must provide competent crew, 497.

Liability of steamboat company for quarrelsome, 1093, note 13.

CROSSING TRACKS—

Crossing tracks to reach or leave cars, 1219.

General rule that person, before crossing railway track, must stop, look and listen, 1219.

But passenger, invited by carrier to cross railway track, in order to reach or leave cars, not bound to stop, look and listen for approaching trains, 1219.

Rule does not extend to protection of passenger who attempts to cross track at time when no invitation held out to him to do so, 1219.

Notice to passengers not to cross intervening track, carrier may waive, 1219.

Passenger, although invited to cross intervening track, must exercise ordinary care for his safety, 1219.

CROSS-TIES—

Iron or granite cross-ties not required upon the roads of railway companies, because less liable to decay, 897.

[REFERENCES ARE TO SECTIONS.]

CROWDING—

Liability of carrier for injuries arising from crowding of other passengers, 983.

CULVERT—

Liability of passenger carrier for defective, 910, note 19.

CUSTOM (See USAGE)—

CUSTOM HOUSE—

Effect of failure of charterer to perform his agreement to enter vessel at, 843, note 20.

CUSTOM HOUSE OFFICIALS—

Delivery to, by carrier by water, 700.

The duty and liability of the carrier when goods are detained by, 755.

Demurrage when delay is due to customs officers, 836.

CUSTOMS DUTIES—

Station agent has implied power to make provision for clearance of customs duties, 462, note 19.

Carrier's lien includes legal import duties paid either to government directly or to connecting carrier, 866.

"CUSTOMARY DISPATCH"—

In charter party, meaning of, 839.

Includes usages as to working hours, 839.

Also the order in which vessels come up to the wharf, 839.

Also the observance of holidays, 839.

But does not admit of detention to suit the convenience or business purposes of consignor or consignee, 839.

"CUSTOMARY QUICK DISPATCH"—

In charter party, meaning of, 839.

When platform scales necessary for weighing sugar under provision for, 839.

DAMAGED GOODS—

Consignee's right to return, 734.

DAMAGES—

MEASURE OF, AGAINST CARRIER OF GOODS—

In general—

For breach of oral agreement, 172.

What will constitute a waiver of such damages, 172.

Harter Act, effect of, on damages recoverable by cargo owner, 387.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, AGAINST CARRIER OF GOODS—*In general*—
con.

Where limited to agreed valuation of goods, see Value of Goods; Limitation of Liability by Contract.

Measure of recovery where limited to agreed valuation and loss is only partial, 429.

Contracts limiting recovery to value of goods at time and place of shipment, 430.

Where recovery limited to agreed value of goods, carrier liable for real value if he negligently makes delivery after notice of stoppage *in transitu*, 432.

Where recovery limited to agreed value of goods, carrier liable for real value if guilty of a conversion, 432.

Sending goods by another than stipulated route in order to mitigate damages, 480.

~ Negligent delay in transportation, damages for, 651 and notes. Party liable for freight may set off damages, 799.

But in England, carrier may collect full freight, and owner must resort to separate action, 799.

Measure of, in case of improper detention of vessel, not fixed and certain, 832.

If vessel not employed, no damages sustained, 832.

Where vessel detained with full crew and cargo, expenses going on, earnings furnish assistance in determining damages, 832.

Where demurrage days provided for, and a rate of demurrage agreed on, that rate is *prima facie* the standard for measuring shipowner's loss, 832.

Carrier's lien lost where he is liable for damages to goods equal to or exceeding the freight charges, 874.

Difference in measure of, between actions of tort and contract, 1358.

Measure of, for not accepting and carrying goods, 1359.

Measure of, for loss of goods—

Usually value at place of delivery, with interest, deducting amount due for transportation, 1360.

Incidental damage, flowing proximately from loss, may be recovered, 1360.

Exceptions to rule, 1361.

Where owner has sold goods at certain price, he cannot recover in excess, 1361.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, AGAINST CARRIER OF GOODS—*Measure of, for loss of goods*—con.

Conversion of goods by carrier, must account to owner for amount he receives, 1361.

Goods lost before ship leaves port, measure of damages is value at port of departure, 1360, note 26.

Goods not intended for sale or having no market value, measure of damages for loss of, actual value to owner at time of loss, 1363.

Family portrait, measure of damages for loss of, 1363.

Second-hand goods, measure of damages for loss of, 1363.

Building plans, measure of damages for loss of, 1363.

Household goods, measure of damages for loss of, 1363, note 8.

How when amount of loss limited by contract, 1364.

Measure of, for injury to goods—

—Usually difference between value of goods as actually delivered and as they should have been delivered, with interest, deducting amount due for transportation, 1362.

Damages proximately resulting from injury, may be recovered, 1362.

Reasonable expenses in seeking to reclaim goods, may be recovered, 1362.

Reasonable expenses in restoring goods to former condition, may be recovered, 1362.

Reasonable expenses in endeavoring to reduce loss to lowest amount, may be recovered, 1362.

Market value at destination controls, and not at terminus of road of intermediate carrier, 1362, note 2.

Where no market value at destination, resort should be had to next nearest market, 1362, note 2.

Freight charges, failure to deduct, not error in absence of proof that such charges have not been paid, 1362, note 2.

Consignee cannot refuse to accept injured goods, 1365.

But where entire value of goods is destroyed, consignee may refuse to receive them and sue for value, 1365.

Damages for delay in transportation and delivery—

Usually difference between market value at destination when goods should have arrived and value at time of delivery, with interest from time when goods should have been delivered, 1366.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, AGAINST CARRIER OF GOODS—*Damages for delay in transportation and delivery*—con.

Incidental damages, proximately flowing from the delay, may be recovered, 1366.

Expense incurred in making journey to get goods may be recovered, 1366.

Expense incurred in searching for goods may be recovered, 1366.

Expense incurred in caring for goods until next market day may be recovered, 1366.

Expense incurred in making reasonable efforts to make loss as light as possible may be recovered, 1366.

Expense incurred in sending goods elsewhere to find market may be recovered, 1366.

Where, through delay, goods have become worthless, owner may recover as for their loss, 1366.

When no difference in value of goods when they should have arrived and when they did in fact arrive, shipper entitled to nominal damages, 1366, note 31.

Where, through delay, there is no market value at destination, and goods are shipped to another market, measure of damages is difference in value on market at destination in condition and at time they should have arrived and sum they sold for on other market, 1366.

Special damages, 1367, 1368, 1369.

Special damages, carrier not liable for, unless informed of special circumstances requiring expedition in shipment, 1367.

Notice of special circumstances requiring expedition in shipment must be given to carrier at time contract for carriage is made, 1367.

Notice after contract entered upon, although given in time to prevent delay, cannot operate to subject carrier to liability for special damages arising from subsequent delay, 1367.

Carrier not informed of special circumstances, liable only for depreciation in market value, 1367, 1369.

Effect of notice of special circumstances requiring expedition in shipment, given after contract to carry has been performed, but before goods delivered, 1368.

Measure of damages for delay in transporting articles intended for use in business, 1369.

Carrier not liable for loss of use of article intended for use

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, AGAINST CARRIER OF GOODS—*Damages for delay in transportation and delivery*—con.

in business, unless informed, when contract is made, of special use to which article is to be put, 1369.

Profits, loss of, through delay in transporting article intended for use in business, carrier not liable for, unless informed, when contract is made, of special use to which article is to be put, 1369.

Knowledge by carrier of general use to which article is to be put, not sufficient to charge him with liability for loss of its use or profits, 1369.

Carrier ordinarily liable for only such damages as may reasonably be presumed to have been in contemplation of the parties when contract was made, 1367, note 33, 1369.

Carrier ordinarily liable for only such damages as are the natural and necessary sequence of breach, 1369.

Losses in business not to be allowed unless reasonably ascertained by calculation, 1369.

Party injured must make reasonable efforts to avoid loss, 1369.

Where property not for sale as merchandise, carrier ordinarily liable, in absence of notice of special circumstances requiring expedition in shipment, for rental value of the property during the delay, 1373.

Damages where carrier refuses to perform contract—

Carrier liable for difference between market value at destination at time when goods should have arrived there and value at same time at place from which they should have been carried, less the freight, 1370.

But owner must exercise reasonable effort to procure other means of conveyance, 1370.

Where owner can procure other means of conveyance, carrier liable for excess in cost of shipment, 1370.

But right of owner, where carrier refuses to accept and carry goods, to procure other means of conveyance and charge carrier with excessive cost, depends on nature of goods and circumstances of case, 1371.

Where carrier demands higher rate than that provided by contract, and same is not unreasonable, owner should ship goods and pay rate demanded and sue to recover difference, 1370.

Special damages, right to recover, where carrier refuses to accept and carry goods, 1370.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, AGAINST CARRIER OF GOODS—con.*Conversion of goods—*

So long as goods remain in specie, owner must accept them, and can recover only damages sustained by the delay, 1372.

Acceptance of goods by owner after unreasonable delay, no waiver of right to recover damages, 1372.

Measure of damages for conversion of goods, value at place of destination, with interest, less cost of transportation, 1374.

Tender of goods by carrier after a conversion, may be shown in mitigation of damages, 1374.

Payment to owner by person to whom carrier has wrongfully delivered goods, may be shown in mitigation of damages, 1374.

Damages for injury to, or delay in shipment of dead bodies—

Widow may recover for injury to body of her deceased husband, 1375.

Widow may recover for distress of mind occasioned by delay in shipment of body of her deceased husband, 1375.

Father may recover for mental suffering occasioned by unreasonable delay in shipment of body of his deceased son, 1375.

But where existence of relatives of deceased person not disclosed to carrier, mental anguish suffered by them, in consequence of delay in shipment of body, not recoverable, 1375.

MEASURE OF, FOR PERSONAL INJURIES TO PASSENGERS—*In general—*

Difficulty of distinguishing between damages arising from breach of contract and those arising from tort, 1421.

Must generally be measured by rule of compensation, 1421.

Elements entering into question of compensation, various and uncertain, 1421.

Compensation not confined to mere pecuniary loss, 1422.

May embrace recompense for pain and suffering of both body and mind, 1422.

Future as well as past physical pain and suffering may be considered, 1422.

But future pain and suffering must be reasonably certain, 1422.

Future damages may be considered, 1423.

Incapacity of injured party to attend to his ordinary pursuits, damages may be recovered for, 1423.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—
In general—con.

Reasonable expenses incurred for medical attention, damages may be recovered for, 1423.

Diminished capacity for labor or loss of health, proper elements of damage, 1423.

State of health of party injured, a proper subject of inquiry, 1423.

In case of death, probable duration of life may be shown, 1423.

Future damages must not be speculative or problematical, 1423, note 1.

Competent to show what plaintiff was earning at time of injury, 1423.

Opinion of witnesses as to amount of loss, inadmissible, 1423.

Evidence of peculiar circumstances of plaintiff, or number of family dependent upon him, inadmissible, without showing earnings, 1423.

Defendant may show that plaintiff's business was unlawful, 1423.

Defendant cannot show benefit from insurance policy in diminution of damages, 1423.

In America, this rule applicable to cases under statute and common law, 1423.

In England, limited to cases under common law, 1423.

Defendant cannot show, in diminution of damages, benefits arising in favor of plaintiff from distribution of deceased's estate, 1423, note 8.

Inconvenience or annoyance, a proper element of damage, 1424.

And this, without reference to loss of time or money, 1424.

Passenger negligently set down short of or beyond his destination may recover for inconvenience and expense in getting to destination, 1424.

But damages for disappointment resulting from delay are too remote to be recovered, 1424.

Suffering must be real, 1425.

Damages for delay in transporting passenger, 1426.

Usually compensation for time lost, and necessary expenses incurred, 1426.

Compensation for time lost, must be determined by an average of what passenger has earned for a reasonable period next preceding time of delay, 1426.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—
In general—con.

Failure to carry to destination, passenger may recover reasonable value of services at such point, it being shown there was a continuous demand at destination for such services as he was fitted to perform, 1426.

But where passenger without knowledge of what occupation he will procure at destination, loss of wages or profits not recoverable, 1426.

Mental suffering, when damages recoverable for, 1427.

Mental suffering, not an element of damage, unless accompanied with physical injury, 1427.

But where passenger subjected to abuse, insult or malicious treatment, damages for consequent mental pain and suffering may be recovered, 1427.

Wrongful ejection, damages for mental suffering occasioned by, may be recovered, 1427.

Indignities suffered at hands of fellow passengers, which carrier could have prevented, damages for mental suffering occasioned by, may be recovered, 1427.

- False arrest by carrier's servants, damages for mental distress occasioned by, may be recovered, 1427.

Passenger becoming insane through hardship attending an accident, carrier not liable in damages for insanity thus produced, 1427, note 27.

Fright, damages for, not recoverable unless accompanied by bodily injury, 1427.

But where nervous shock so great as to cause bodily injury, it may be considered as an element of damage, 1427.

Damages must be proximate and natural consequence of injury, 1428.

Passenger wrongfully put off train, sickness caused by, held too remote to be considered an element of damage, 1428.

This rule followed where action was for tort as well as where action was for breach of contract, 1428.

Failure of train to stop to take on passenger whereby passenger undertakes to walk to destination, sickness caused by, too remote to be considered an element of damage, 1428.

Mere accident, damages for injury due to, not recoverable, 1428.

Rule that where breach of contract to carry in itself amounts to a tort carrier must respond, whether action be for breach

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—*In general—con.*

of contract or for tort, if passenger receive injury while seeking to extricate himself from place where carrier has wrongfully placed him, 1429.

But passenger must have exercised reasonable care and prudence for his own safety, 1429.

This rule followed by most of states of this country, 1429.

Under this rule, sickness caused by being wrongfully put off train may be recovered, 1429.

Or by being unjustifiably detained and exposed to unhealthy climate, 1429.

Or by being compelled to walk back to destination after having been negligently carried beyond it, 1429.

Or by leaving passenger exposed all night to weather after failure to stop at advertised landing place, 1429.

Or by being compelled, on account of station being closed, to wait upon platform for delayed train, 1429.

Or by being obliged to wait for a delayed train in station not heated, 1429.

But where passenger has forfeited his right to ride, compensation for suffering caused by exposure, not recoverable, 1429, note 42.

How question of proximate cause determined, 1430.

Passenger must seek to make his damage as light as possible, 1431.

But passenger only required to exercise reasonable care and prudence, 1431.

Effect of previous sickness or disease on damages recoverable, 1432.

Carrier liable to full extent of injury as affected by such previous sickness or disease, 1432.

Ignorance of carrier of previous sickness or disease, no excuse, 1432.

Fact that passenger wears artificial limb which aggravates injury, no excuse to carrier, 1432.

Fact that female passenger who is pregnant would not have been injured had she not been pregnant, no excuse to carrier, 1432.

Although disease is immediate cause of death, if death be hastened by injury due to carrier's negligence, carrier will be liable, 1432.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—

In general—con.

Where disease, caused by injury, supervenes carrier will be liable for full compensatory damages, 1432.

Damages in case of maltreatment, 1433.

Where passenger wrongfully expelled from train, indignity, rudeness, insult or unnecessary force which accompanies act of expulsion may be considered by jury in aggravation of damages, 1433.

Where passenger wrongfully expelled from train, feelings of shame and humiliation endured, proper elements of damage, 1433.

Where expulsion not wrongful, carrier liable if unnecessary force or violence be used, 1433.

Maltreatment of passenger, how when provoked by insulting language or violent conduct of passenger, 1434. See, also, 1102.

Insulting language by passenger toward carrier's servant, no justification for assault upon passenger, 1434.

Carrier's servant may use force to repel an attack upon his person by passenger, 1434.

But must use only such force as is reasonably necessary to his defense and protection, 1434.

Where assault upon passenger by carrier's servant is provoked by passenger's insulting language or violent conduct, carrier may offer proof of passenger's language or conduct in mitigation of damages, 1434.

Rule that such proof may be offered in mitigation of both compensatory and exemplary damages, 1434.

Rule that such proof is admissible in mitigation of exemplary damages only, 1434.

Special damages—

Must be pleaded and proved, 1409, 1410.

Carrier not liable for, unless informed, when contract is made, of special circumstances from which such damages will arise, 1421.

Damages for death by wrongful act—

Measure of, depends to great extent upon statute giving right to sue, 1397.

If statute a survival statute, damages determined as in ordinary actions for personal injuries, 1397.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—
Damages for death by wrongful act—con.

Where new cause of action created for benefit of personal representative of deceased, damages are such a sum as deceased would probably have earned in his business during his life, 1397.

Where new cause of action created for benefit of deceased's estate, damages are such a sum as deceased would probably have earned in his lifetime and left as his estate, 1397.

Age of deceased, his ability and disposition to labor, his habits of living and expenditures, become material, 1397.

Where new cause of action created for benefit of next of kin, damages are the pecuniary loss sustained by those entitled to benefits derived from action, 1397.

This rule adopted by majority of states, 1397.

Word "pecuniary," when used in statutes, looks to prospective advantages of a pecuniary nature which have been cut off by premature death, 1397.

Word "pecuniary," excludes those losses resulting from deprivation of society and companionship of relatives, 1397.

In England, rule of ascertaining pecuniary loss to next of kin admits benefits derived from insurance to consideration, 1423.

In America, evidence of benefit derived from insurance, inadmissible, 1397, note 28, 1423.

Evidence that children were benefitted by parent's death by receiving their distributive shares of his estate, inadmissible, 1423, note 8.

Mortality tables may be used in estimating probable duration of life of deceased, 1397, note 28.

Remarriage of widow, not to be considered in abatement of damages, 1397, note 28.

Receipt of mortuary benefits, not ground for abatement of damages, 1397, note 28.

Savings of deceased will not decrease widow's recovery, 1397, note 28.

Evidence of pecuniary condition of next of kin, not proper to admit, 1397, note 28.

Parents care and training, loss of, may be considered, 1397, note 28.

Damages reckoned from date of death and not of injury, 1397, note 28.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—
Damages for death by wrongful act—con.

Damages for mental suffering of beneficiaries, not recoverable, 1398.

Nominal damages, whether recoverable, 1399.

Punitive damages, ordinarily not recoverable, 1400.

Amount of damages recoverable, pre-eminently a question to be determined by jury, 1401.

Maximum limit of recovery, usually prescribed by statute, 1401.

Distribution of damages recovered, usually provided for by statute, 1402.

Amount recovered, usually free from claims of creditors and legatees, 1402.

Where amount recovered regarded as an asset of deceased's estate, creditors entitled to share, 1402.

Exemplary or punitive damages—

Recovery not always limited to rule of compensation, 1435.

When carrier guilty of reckless misconduct or gross negligence, exemplary damages may be recovered, 1435.

Exemplary or punitive damages allowed to prevent recurrence of similar misconduct, 1436.

Where neglect to furnish safe tracks, vehicles, station facilities and the like is so gross as to amount to reckless disregard of passengers safety, exemplary damages may properly be awarded, 1437.

Pecuniary ability of carrier to perform his duty, no excuse, 1437.

But to justify an award of punitive damages, action must be against wrongdoer, 1438.

Carrier not liable to punitive damages for reckless acts of servants unless shown to be a party to wrong, 1438.

Carrier only liable for such damages, therefore, where he has expressly or impliedly authorized or ratified servant's reckless act, 1438.

Retention of servant in employment, with knowledge of his unfitness, carrier liable for punitive damages where servant's reckless misconduct has occasioned injury, 1439.

The more liberal rule, 1440.

View that where act of servant is so gross as to amount to recklessness, punitive damages may be allowed, although carrier has neither authorized nor ratified servant's negligent conduct, 1440.

[REFERENCES ARE TO SECTIONS.]

DAMAGES—MEASURE OF, FOR PERSONAL INJURIES TO PASSENGER—
Exemplary or punitive damages—con.

- When punitive damages allowed for active maltreatment of passenger, 1441.
- Carrier liable for punitive damages where injury to passenger caused by wilful, malicious or oppressive treatment, 1441.
- But carrier himself must have committed act, or have directed, authorized or ratified it, 1441.
- Where act committed by servant, carrier not liable for punitive damages, unless servant was acting within scope of employment, 1441.
- Evidence of authority or ratification, 1444.
- Authority or ratification may be shown by circumstances, 1444.
- Whether carrier authorized or ratified servant's reckless or oppressive act, usually a question for jury, 1444.
- Retention of guilty servant in employment, after notice of his misconduct, evidence of ratification, 1444.
- Promotion of guilty servant, after knowledge of his misconduct, evidence of ratification, 1444.
- View that mere retention of guilty servant, after knowledge of his misconduct, no evidence of ratification, 1444.
- Doctrine of *ex post facto animus*, as a basis of exemplary damages, held an anomaly, 1444.
- The more liberal rule, 1442.
- View that carrier is liable to punitive damages for the wilful, malicious, oppressive, insulting or fraudulent act of his servant, although he has neither authorized nor ratified it, 1442.
- But to hold carrier liable for such damages, act must have been committed by servant in course of his employment, 1442.
- Carrier not ordinarily liable for punitive damages where servant acted without malice and in good faith, 1443.
- Carrier not ordinarily liable for exemplary damages for acts of servants unless latter would have been so liable, 1445.
- Carrier may disprove wrongful intent, 1446.
- But evidence to disprove wrongful intent not admissible where only compensatory damages are claimed, 1446.

DANGEROUS GOODS—

Common carriers—

- Carrier may refuse to carry, when, 145, 147.
- Carrier may stipulate for exemption when goods of a dangerous character are accepted for carriage, 423.

[REFERENCES ARE TO SECTIONS.]

DANGEROUS GOODS—*Common carriers*—con.

Dangerous goods should be carried on deck, 605.

Carrier as warehouseman not liable for loss from explosion of dangerous goods of the character of which he was not aware, 685.

Carrier not bound to transport dangerous goods unless it is his customary or professed business to do so, 796.

When goods dangerous in transportation, duty of shipper to make known such fact, 796.

Carrier may demand knowledge of contents of suspicious packages, 796.

Not liable to shipper for loss occasioned by dangerous character of goods, unless made known to him, 797.

But liable to shippers of other goods for such losses, 797.

Shipper liable to carrier for damages sustained by other shippers through loss occasioned by the carriage of dangerous goods, and paid to them by carrier, 798.

Passenger carrier—

When carrier liable for injury caused passenger by dangerous articles brought into vehicle by another passenger, 921.

DANGERS OF NAVIGATION (See PERILS OF THE SEA)—

Dangers of the sea under the Harter Act, 384.

DANGERS OF THE SEA (See PERILS OF THE SEA)—

“DAYS”—

When used in reference to demurrage, includes all running or successive days, including Sundays and holidays, 837.

When Sundays alone excepted, charterers not exempt from demurrage for holidays and days on which laborers will not work, 837.

Days not excepted on which laborers refused to work owing to storms, 837, note 55.

Or on which labor organizations attended a funeral, 837, note 55.

Or for celebration of Labor Day, 837, note 55.

Half holidays not made obligatory by statute usually not excepted, 837, note 55.

When parts of day computed in demurrage, 838.

DEAD BODY—

When carrier may refuse to accept dead body for transportation, 145, note 3.

[REFERENCES ARE TO SECTIONS.]

DEAD BODY—con.

Damages for delay in transportation of, 651, note 14.

Cannot be transported on mileage ticket, 1056, note 59.

Widow may recover for injury to body of her deceased husband, 1375.

Widow may recover for distress of mind occasioned by delay in shipment of body of her deceased husband, 1375.

Father may recover for mental suffering occasioned by unreasonable delay in shipment of body of his deceased son, 1375.

But where existence of relatives of deceased person not disclosed to carrier, mental anguish suffered by them, in consequence of delay in shipment of body, not recoverable, 1375.

“DEAD-HEADS”—

Duty of carrier to, 1001.

DEAF PASSENGERS—

Duty of carrier towards, 993.

How contributory negligence affected by deafness of passenger, 1231.

DEALER—

Carrier as dealer in articles of transport under section three of Interstate Commerce Act, 555.

DEATH—

Although disease is immediate^s cause of, if same be hastened by injury due to carrier's negligence, carrier will be liable, 1432.

DEATH OF ANIMALS (See LIVE ANIMALS)—

Carrier not liable for natural death of animals, 334.

From starvation or thirst, 634.

DEATH BY WRONGFUL ACT—

See LORD CAMPBELL'S ACT.

DEBT—

Payment of carrier's prior debt by carriage as discrimination, 546.

Carrier cannot hold goods for debts due himself not connected with the carriage, 866, note 18.

DECAY—

Carrier entitled to freight, though the goods have become worthless through natural decay, 802.

Carrier not liable for losses from, 334, 385.

[REFERENCES ARE TO SECTIONS.]

DECEASED—

When declarations of deceased admissible to prove passengership relation, 1008, note 46.

Contributory negligence of, effect of, on action for causing his death, 1391.

DECK—

When goods may be carried on deck, 169.

No presumption of unseaworthiness because deck leaks after a continuous gale, 371.

But improperly caulked deck may make vessel unseaworthy, 371.

Carrier liable for loss of goods stowed on deck without consent of owner, though necessarily jettisoned in storm, 603.

In such case balance of cargo not liable to contribution, 603.

In absence of bill of lading, or when it is silent as to stowage, contract is to stow under deck, 604.

Established usage in particular trade, or of particular class of goods, will justify carriage on deck, 605.

Dangerous goods should be stowed on deck, 605.

So with live animals, 605.

By custom of particular trade lumber may be, 605.

In such case owner entitled to contribution for loss by jettison, 605.

Stowage must be on deck where safety of goods requires, 605.

Liability of passenger carrier for unguarded opening on deck of vessel, 911.

DECK HAND—

Delivery to deck hand of boat not sufficient, 107.

DECLARATION (See ACTIONS; PLEADING)—

Not necessary to state consideration in declaration against carrier without hire, 34.

Allegation of negligence, necessary, 34.

Of degree of negligence, unnecessary, 34.

Against common carrier for refusal to carry, allegation of tender of money for freight unnecessary, 150.

Declaration of duty to carry in a "reasonable" time not sustained by proof of a contract to carry in a prescribed time, 625, note 14.

Mere allegation of promise in declaration not sufficient to make it one upon contract, 1328.

Declaration by consignor must allege ownership, 1334, note 1.

Variance between declaration and proof, 1337.

[REFERENCES ARE TO SECTIONS.]

DECLARATION—Con.

Whole contract must be stated, 1338.

Collateral stipulations need not be set out, 1340.

Declaration in action for statutory penalty for excessive overcharge, 1341.

Averments as to overcharge, 1343.

Averments as to carrier's reward or compensation, 1344.

DECREASE—

Carrier may be loser by decrease in bulk or weight during voyage, 813.

DECREE—

Carrier not entitled to compensation, if goods sold under erroneous decree of court, subsequently reversed, 817.

DEEDS—

Not baggage, 1245, note 10.

DEFECT (See CARS; VEHICLES; ROADS)—

Carrier not excused because defective vehicles used by him are owned by another, 498.

Initial carrier liable for defective vehicle furnished by him although damage develops on line of connecting carrier, 499.

This true even though initial carrier restricts liability to his own line, 499.

And even if shipper contracts that carrier shall not be liable, 499.

Liability of connecting carrier for defective vehicles or bedding, 500.

Defect in coupling is negligence, 504.

How where shipper selects the vehicle himself, 506.

Liability of carrier for defective stalls or bedding, 509.

DEFICIENCY IN CARGO—

Effect of clause in bill of lading that deficiency in cargo shall be paid for by carrier, 164, 267.

Provision that claim for loss through deficiency in cargo shall be made in seven days is valid, 397, note 16.

DEFINITIONS—

Bailment, 1.

Carrier without hire, 16.

Common carrier, 47.

Private carriers for hire, 35.

Bill of lading, 152.

[REFERENCES ARE TO SECTIONS.]

DEFINITIONS—con.

Act of God, 269.

Public enemy, 314.

Seaworthiness, 366, and 366, note 49.

Due diligence, 380.

"In transit," 466.

"Clean bill of lading," 603.

"C. O. D.," 726, note 28.

Insolvency, 761.

Demurrage, 832.

DEFRAUDERS—

Duty of carrier to, 1,000, 1001.

DELAY—

Whether carrier liable for loss by act of God which would not have occurred but for his unreasonable delay, 297-307.

How where loss, due to cause exempted by contract, would not have occurred but for the carrier's unreasonable delay, 306.

Effect of unreasonable delay upon insurance, 307.

Whether exception against loss by delay is reasonable, 397, note 16.

Damages from delay not covered by provisions that carrier shall have benefit of insurance or that claim shall be filed in certain time, 464, note 34.

Carrier liable, though exemption be for losses from delay, if delay is occasioned by negligence, 479.

Common carrier accepting goods must inform shipper of any necessary delay in transportation, 495.

When bound to carry to destination, must inform shipper of delay on connecting route, 496.

Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock, 644.

Mere delay no excuse for abandonment of goods by owner, 651.

And not a conversion, 651.

Damages for delay in transportation of dead body, 651, note 14.

Mere rush of business no excuse for failure to transport with reasonable dispatch, 651, note 14.

Fact that goods are received on Sunday no excuse for unreasonable delay, 651, note 15.

Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.

When initial carrier is liable for negligent delay in delivering to succeeding carrier, 651, note 16.

[REFERENCES ARE TO SECTIONS.]

DELAY—con.

- Mere delay will not sustain action of replevin unless demand for goods made, 651.
- Owner may recover any reasonable expense occasioned by delay, 651.
- What is reasonable time, question of fact, 652.
- Inadequacy of loading facilities, 652, note 20
- Carrier bound to transport perishable property immediately, 652, note 20.
- Liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.
- Negligent delay in transportation of live stock renders carrier liable, 652, note 20.
- How far carrier responsible for unavoidable delay, 653.
- Unavoidable delay in the shipment of live stock, 653, note 21.
- Delay through insufficiency of engines, 653, note 22.
- Delay through fall of dew, 653, note 22.
- Delay through acceptance of enemies' goods, 653, note 22.
- What will excuse delay, 654.
- Delay through necessity of repairs, 654.
- Delay through snow rendering road impassable, 654.
- Washing away of bridges, 654.
- Low stage of water, 654.
- Freezing of canal or river, 654.
- Collision through negligence of another carrier, 654.
- Obstruction through negligence of another company, 654.
- Destruction of part of road or city by fire, 654.
- Atmospheric conditions rendering telegraph wires unavailable, 654.
- Washouts caused by unprecedented floods, 654.
- Delay through obstructions by ice, 655.
- Embargo delays carriage, 655.
- Circumstances may make delay a duty, 656.
- Delay through strikes, mobs or riots, 657.
- Shipper should receive notice from carrier of such delay, 657, note 42.
- Carrier must complete carriage where cause of delay removed, 658.
- Burden of proof on carrier to show transportation in reasonable time after impediment removed, 658, 659.
- Carrier holds as warehouseman on unreasonable delay of consignee in taking goods away, 685.

[REFERENCES ARE TO SECTIONS.]

DELAY—con.

Consignee responsible for loss occasioned by unreasonable delay in removing goods from wharf of carrier by water, 694.

Delay of journey, while carrier is not at fault, caused by act of God, inclemency of weather, etc., does not justify carrier in terminating it, 801.

Transshipment of goods when vessel delayed, 822.

Damages for delay in loading or unloading, see DEMURRAGE.

Measure of damages for, in transporting goods, 1366.

Not a conversion of the goods, 1372.

In shipment of dead body, widow may recover for distress of mind occasioned by, 1375.

Damages for, in transporting passenger, 1426.

DELIRIUM TREMENS—

Restraining passenger afflicted with, 980, note 40.

DELIVERY BY CARRIER—

Of the general duty to make delivery—

Goods must be delivered only in accordance with bill of lading and its indorsements, 177.

If person claiming goods fails to present proper bill of lading, carrier must base refusal to deliver on that ground, 178.

See BILL OF LADING.

Matters relating solely to delivery may be governed by law of the place of delivery, 203.

Act of God will not excuse if carrier has wrongfully refused to deliver goods, 313.

Vessel liable under Harter Act for negligence in delivery of cargo, 360.

Vessel is liable for failure to deliver at all through master's negligence in overlooking the goods, 361.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432.

Effect of failure to deliver at all on condition that claim for damages shall be presented within a certain time, 445.

Condition that claim shall be presented in certain time no defense to an action for misdelivery where carrier falsely asserted he still continued to hold the goods, 445, note 14.

Jury entitled to presume negligence where carrier fails to deliver and exemptions cannot avail, 477, note 22.

Signification by word delivery, as applied to common carrier,

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Of the general duty to make delivery—*
—con.

- dependent upon his particular kind of business and mode of transportation, 662.
- Every delivery must be made to the right person at a reasonable time, and proper place and manner, 664.
- Any or all of these requisites may be waived, 664.
- Acceptance of goods a waiver, 664.
- Refusal of consignee to receive for any of these reasons does not relieve carrier, if in fault, from responsibility for safety of goods, 664.
- Former rule as to delivery, 665.
- Generally carrier must make personal delivery to person entitled to receive goods, 666.
- To excuse delivery to person other than one entitled to goods carrier must show long-continued and well-understood usage, 666.
- When personal delivery required, duty of carrier to seek consignee and tender goods to him, 667.
- If consignee not there, reasonable diligence must be used to find him, 667.
- What is reasonable diligence, question of fact, 667.
- Effect of change in name on a way-bill or receipt given by a careless clerk, 667, note 8.
- Carrier bound at all events to deliver to right person, 668.
- Neither fraud, imposition nor mistake will excuse delivery to wrong person, 668.
- Law exacts absolute certainty of carrier, 668.
- Qualified refusal of carrier to deliver goods until identity of owner is established is not a conversion, 668.
- But delivery to wrong person is a conversion, 668.
- Carrier protected in refusal to deliver to unidentified consignee even though security offered, 668, note 13.
- Effect of loss of "notice of arrival," 668, note 13.
- Effect of negligent delivery to person not the consignee, 669, 670, 671.
- Delivery by carrier to swindler, 669, 670, 671, 672.
- Some courts hold carrier not liable for innocent delivery to consignee though a swindler, 672.
- This rule qualified even by courts which follow it, 672.
- Contrary view prevails in better reasoned decisions, 673.
- Delivery on forged order no excuse, 674.
- Or to wrong party by mistake, 674.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Of the general duty to make delivery—*
—con.

Or to unauthorized agent, 674.

Delivery to janitress, 674, note 31.

How where goods are consigned to agent of carrier, 675.

How where consigned to consignee in care of another person, 676.

When owner may maintain replevin although goods are shipped in care of a third person, 676.

Effect of misdirection of goods, 677, 333.

Duty of carrier when he knows that goods are misdirected, 677.

Receipt as evidence of correctness of address on package, 677.

Carrier not liable where wrong delivery induced or ratified by owner, 678.

Delivery of goods consigned to corporation before actual incorporation, 678, note 43.

Whether receiving goods at another place is a waiver of a misdelivery, 678, note 44.

Whether acceptance of part payment for goods is a waiver of claim against carrier for damage to remainder, 678, note 44.

Doctrine of the cases stated, 679.

When delivery at wrong place is deemed a conversion, 680.

What necessary to charge shipper with notice that goods have been billed to wrong place, 680.

Liability of carrier as warehouseman—

Stringent rules as to delivery do not apply when carrier becomes warehouseman or ordinary bailee, 681.

In such case, wrongful delivery excused if induced by fraud, imposition or fault of sender or consignee, 681-684.

When carrier holds as warehouseman, not liable unless loss occur through his fault or negligence, 685.

Carrier holds as warehouseman after failure to find consignee, or after his refusal to accept the goods, or after a reasonable time has elapsed for him to take them away, 685.

Carrier as warehouseman not liable for loss caused by accidental fire, explosion of dangerous goods, leakage, or loss by theft without his fault or negligence, 685.

Shipper cannot order carrier to deliver goods from time to time and still hold him liable as a common carrier, 685, note 4.

General statement as to when responsibility as carrier terminates and that as warehouseman begins, 686.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—con.

Delivery by carriers by water.

Carriers by water and by railway not required to make personal delivery, 687.

Carrier by water must land goods at wharf and notify consignee or owner, 687.

Must provide suitable and safe place for landing goods, 688.

Not discharged from responsibility by landing at exposed place without protection and notifying consignee, 688.

Duty of carrier by water when consignee refuses to receive the goods, 688, note 12.

After consignee accepts the goods, duty of protecting property is cast upon him, 688, note 12.

Duty of carrier by water as to perishable goods, 688, note 12.

Carrier by water must give notice of arrival and allow reasonable time for removal, 689.

When responsibility as carrier ceases, 689.

When notice to consignee must be actual, 690.

Publication in newspaper insufficient, 690.

Notice to clerk, 690, note 15.

Notice to consignee's wife, 690, note 15.

Notice by mail, 690.

Custom to notify by mail, 690.

Goods must be put in situation for removal, 691.

Goods must be separated so as to afford consignee an opportunity for inspection and removal, 691.

Must be conveniently accessible, 691.

Consignee not bound to accept on Sunday or other legal holiday when labor forbidden, 692.

On holidays when labor not forbidden bound to accept, 692.

Unless right to refuse on such day established by custom, 693.

Labor Day, 692, note 21.

Fourth of July, 693.

Consignee must remove goods within a reasonable time, 694.

Responsible for loss occasioned by unreasonable delay in removing, 694.

Carrier cannot land goods unnecessarily and unreasonably distant from place of business of consignee, and require removal as rapidly as if at proper distance, 694.

Rights and duties of carriers and consignee reciprocal in this respect, 694.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Delivery by carriers by water—con.*

Notice of arrival of goods must be given to consignee, if he can be found by reasonable diligence, 695.

Cannot warehouse goods without due effort to find consignee, 695.

Unless proper effort to find and notify consignee be made, carrier still liable as such for safety of goods, 695.

Necessity of notice may be waived by usage, 696.

Usage may be long continuance of same course of business with one consignee, or the uniform usage and course of business of carriers in the same trade in which he is employed, 696.

Necessity of notice may be dispensed with by contract, 697.

At what wharf delivery must be made, 698.

Effect of usage on choice of wharf, 698.

Delivery at ship's tackle, 699.

Mode of delivery may be established by usage, 700.

Delivery to custom house officials, 700.

Delivery by railroads as carriers—

Personal delivery to consignee not required of railway companies, 701.

Notice to consignee of arrival of goods; conflict of authority concerning, 702, *et seq.*

Rule in Massachusetts, 702.

Massachusetts rule followed in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, Pennsylvania and South Carolina, 702.

Reasons for Massachusetts rule, 703.

New Hampshire rule as to delivery by railroads, 704.

New Hampshire rule followed in Alabama, Arkansas, Kansas, Kentucky, Louisiana, Vermont, West Virginia and Wisconsin, 704.

Both Massachusetts and New Hampshire rules require goods to be unloaded from cars with due care and deposited in a safe and suitable place, 705.

Effect of derrick being out of repair, or sidetracking goods, 705, note 34.

Massachusetts and New Hampshire rules as to delivery do not apply to delivery between connecting carriers, 706.

Cases exempting railway companies from duty of notifying

[REFERENCES ARE TO SECTIONS.]

- DELIVERY BY CARRIER—***Delivery by railroads as carriers—con.*
consignee of arrival of goods, inconsistent with general rules of law governing delivery by carriers, 707.
No substantial reason for such exception, 707.
New York rule as to delivery requires notice if consignee is not present, 708.
New York rule followed in Michigan, Minnesota, Mississippi and Ohio, 708.
Practically the same result reached by statute in Alabama, California, Tennessee and Texas, 708.
In Delaware, Maryland, Nebraska, Oregon and Washington uncertain which rule is followed, 708.
In New Jersey a combination of New York and New Hampshire rules prevails, 708.
Question of notice becomes immaterial when goods have, in fact, reached their destination, and railroad company, on demand, claims they have not arrived, 709.
Notice unnecessary where consignee has actual knowledge of arrival of goods, 709.
Mode or place of delivery may be established by usage, 710.
Effect of usage on consignee's right to notice of arrival of goods, 710.
Custom not to give notice on Fourth of July valid, 710.
Bulky freight in car load lots must ordinarily be unloaded by party entitled to it, 711.
Small or package freight ordinarily unloaded by railroad company, 711.
What is reasonable time for removal of goods at end of which carrier will hold as warehouseman, 712.
When facts undisputed, reasonable time question of law; otherwise question of fact, 712.
Condition or situation of consignee no element in determining what is reasonable time, 713.
During this reasonable time liability of carrier unchanged, 714.
When it has elapsed, carrier ordinary bailee for hire, 714.
May charge storage, 714.
Liability as warehouseman continues till delivery, 714.
Must furnish reasonable facilities for getting goods, 715.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—con.

Delivery by express companies.

Express companies required to make personal delivery, 716.

Personal delivery excused at small stations, 717.

Company may establish limits in a city beyond which it will not go to make delivery, 717.

How far usage may affect duty to make personal delivery, 718, 719.

Whether carrier who is bound to make personal delivery must give notice of refusal by consignee to receive goods—

Such notice has been held unnecessary, 720.

Better opinion, notice to consignor in such case is necessary, 721.

If consignee owner, notice of storing goods should be given to him, 721.

Carrier not required to give notice where consignee has done so, 721.

Where carrier holds under instructions till goods paid for, and consignee promises to pay for and take away goods within a few days, he becomes warehouseman, and liable only as such, 722.

Effect the same when consignee absent, or after reasonable diligence cannot be found, 723.

In such case, and when carrier knows in any way that goods belong to consignor, his duty to notify latter, 724.

May presume consignee owner, unless otherwise informed, 724.

Duty of carrier to give notice to consignor of absence of consignee, or of his refusal to accept the goods, only arises when personal delivery required, 725.

Rule has no application to railway companies, 725.

Carrier not liable for omission to give notice unless loss consequent upon such omission, 725.

Duty of carrier as to C. O. D. goods—

Undertaking of carrier who accepts, 726.

Not bound to accept unless customary part of his business, 726.

Accepting, held to strict compliance with his instructions, 727.

Goods delivered without exaction of amount due, carrier liable, 727.

Such delivery a conversion, 727.

But such wrongful delivery may be ratified, 727.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Duty of carrier as to C. O. D. goods—*
con.

Obligation to collect on C. O. D. goods rests on contract, express or implied, 728.

Such contract may be verbal, 728.

Need not be incorporated in receipt, 728.

C. O. D. goods delivered to carrier who never undertook performance of such duties, no contract to collect implied, 728.

Words "please collect" in bill accompanying goods, mere request, 728.

Carrier of such goods must, if necessary, retain them a reasonable time to enable consignee to pay for them, 729.

Immaterial whether charges demanded are freight or price of goods, 729.

After tender to consignee carrier holds goods as warehouseman, 729.

Consignee peremptorily refusing to accept, carrier may immediately return goods to consignor, 729.

Not bound to offer goods more than once, 729.

Not compelled to return, but may notify consignor and await orders, 729.

May ordinarily recover goods obtained without payment, but not from *bona fide* purchaser, 730.

Liability of carrier for return of money, 731.

In the absence of express authority agent of carrier cannot guarantee price of goods, 732.

Consignee's right to inspect goods and return damaged goods—

Carrier must afford consignee opportunity to inspect the goods, 733.

Carrier may return money to consignee when consignor has attempted to practice a fraud upon him, 733.

When consignee may return damaged goods, 734.

Consignee's right to change place of delivery—

Generally carrier may deliver at any place appointed by consignee, 735.

But not where title vests in consignee on performance of certain conditions, 735.

Consignee cannot change destination when known to be mere agent, 736.

Consignee cannot change when carriage completed, 737.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—con.

Excuses for non-delivery.

Carrier excused when goods taken from him by legal process, 738-740.

Even when seized under process against stranger, 739, 740.

When seized under process against stranger, no protection to carrier in Massachusetts, 741.

Process to protect must at least be fair upon its face, 742.

Carrier must give prompt notice to consignor or owner of proceedings against goods, 743.

Carrier by water must defend suit till owner notified, 744.

Seizure must not have been brought about by laches or connivance of carrier, 745.

Effect of garnishment or trustee process on property in hands of carrier—

Distinction exists between garnishment of goods after delivery to carrier, but before they are actually placed in car and awaiting transit, garnishment of goods actually in transit or out of state or county, and garnishment of goods held by carrier as warehouseman pending delivery to the consignee, 746.

Where goods actually in depot or yards of carrier no objection to such process, 747.

But carrier not required to forego benefit of contract to transport to destination and take goods from car when goods actually in transit, 747.

When goods are outside bounds of state or county beyond which jurisdiction of court issuing process does not extend, they cannot be reached by garnishment or trustee process, 748.

When carrier holding as warehouseman at destination goods can be reached by garnishment or trustee process, 748.

Duty and liability of carrier where adverse claim set up to property—

May deliver property to real owner, 749.

Not estopped from showing want of title in the bailor, 749.

Bailment raises strong presumption of right to possession, but not conclusive even against bailee, 749.

Carrier presumptively holds for his employer, 749.

And delivering to third person must show him entitled to possession, 749.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Duty and liability of carrier where adverse claim set up to property—con.*

Cannot, of his own motion, set up adverse claim of another as excuse for withholding from bailor, 750.

Owner must himself set up such claim, 750.

Right to deliver to mortgagee after conditions in chattel mortgage broken, 750, note 35.

Carrier justified in withholding goods from bailor when notified by true owner, 751.

When party claiming has not paramount title over bailor, such holding a conversion, 752.

Withholding upon demand made by true owner a conversion, 752.

Carrier may bring bill of interpleader or take indemnity, 752.

Not conversion to hold long enough to satisfy honest doubt as to true ownership, 753.

Carrier not liable for not permitting goods to be seized on process not against owner, 754.

The duty and liability of the carrier when goods are detained by customs officials, 755.

Non-delivery through commendable motives of carrier no excuse, 756.

But carrier excused where goods are obnoxious to police power of state, or if they are infected with contagious disease, 756.

Stoppage in transitu—

When right of, may be exercised, 757.

Only arises in favor of one who stands in relation of vendor to the goods, 757.

Exercise of right by vendor excuses non-delivery by carrier, 758.

No particular form or mode necessary in exercise of right, 758.

Act or declaration of vendor or agent countermanding delivery all that is necessary, 758.

Usual mode, by simple notice forbidding delivery to vendee or requiring that goods shall be held subject to vendor's order, 758.

Vendor may resort to possessory action in law or bill in equity, 758.

Notice may be given by vendor or his agent, 759.

Not necessary that agent should have special authority to stop goods, 759.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Stoppage in transitu*—con.

General authority, or for purposes of consignment, sufficient, 759.

Stoppage by stranger without any authority cannot be ratified after goods have come into vendor's possession, 759.

Goods must be in transit from vendor to vendee in order that right of stoppage should be exercised, 759, note 6.

Notice should be given to person in possession of goods, 760.

If to his employer or agent, under circumstances to afford opportunity to send orders to person in possession, 760.

Right can only be exercised against one discovered to be bankrupt or insolvent after sale, 761.

Insolvency or bankruptcy must be evident, 761.

What is sufficient evidence of, 761.

Actual insolvency not essential, 761, note 9.

Right of stoppage *in transitu* defeated by assignment of bill of lading, when, 762.

Effect of resale by vendee without actual delivery or assignment of bill of lading, 762, note 10.

Rights of a pledgee of a bill of lading on exercise of vendor's right of stoppage *in transitu*, 762, note 10.

Right of stoppage *in transitu* not defeated by attachment or garnishment by creditors of consignee, 763.

Effect of attachment by vendor, 764.

Neither acceptance of draft nor negotiation of notes defeats vendor's right of stoppage *in transitu*, 765.

Necessary to exercise of right that goods should be in possession of middleman, 766.

Not necessary that they should be in the possession of carrier, *qua* carrier, 766.

Sufficient if in his possession as warehouseman, 766.

Sale to carrier in consideration of unpaid freight and pre-existing debts does not make carrier a *bona fide* purchaser, 766, note 20.

How long goods will be deemed in transit, 767.

Actual or constructive delivery defeats right, 768.

After actual delivery to consignee, reshipment by him to further point does not revive right, 768.

When right will be defeated though goods have not come into actual possession of vendee, 769.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Stoppage in transitu*—con.

Carrier cannot of his own will become warehouseman for vendee, 769.

Intentions of both must concur, 769.

Existence of carrier's unpaid lien for freight raises strong presumption he holds as carrier, 769, note 28.

Delivery at vendee's store at the time in possession of sheriff or mortgagee does not defeat right, 769.

Transitus completed when goods delivered at consignee's warehouse, 770.

Or where he intends them to remain until further orders, 770.

Terminated by wrongful refusal of carrier to deliver to consignee, 770.

But not when demand of consignee unauthorized, 770.

Quaere, whether goods in actual possession of vendee, so as to defeat right of stoppage *in transitu*, when he receives them for transportation in his own vehicle, 771.

Recovery of actual possession by vendor not necessary to render right of stoppage *in transitu* effectual, 772.

After notice to carrier, vendor constructively in possession, 772.

Upon refusal to redeliver, vendor may maintain trover against carrier or other person into whose possession goods have come, 772.

But consignor must pay carrier's freight, 772, note 38.

Carrier should refuse to surrender goods if vendee solvent when right attempted to be exercised, 773.

Carrier acts at his peril in either case, 773.

Not necessary that insolvency should have been evidenced by overt act before right attempted to be exercised, 773.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432, 774.

In case of doubt carrier may resort to legal proceedings to ascertain who entitled to possession of goods, 775.

Lawful stoppage protects carrier, 773.

Carrier's right to demand receipt on delivery—

✓ Carrier may demand written receipt on delivery of goods, 776.

Refusal to give receipt, good defense in action for goods, 776.

When owner desires to remove goods at different times, and separate parcels, carrier may demand receipt for all as condition precedent, 776.

"Clear" receipt does not necessarily preclude consignee from

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Carrier's right to demand receipt on delivery*—con.

afterwards proving that the goods were in fact damaged when received from carrier, 776, note 46.

When carrier *prima facie* entitled to a receipt for entire cargo, although slight discrepancy exists in recount, 776, note 47.

Carrier cannot require surrender of bill of lading, 777.

Effect of assignment of spent bill of lading, 777, note 49.

Carrier not entitled to freight if he negligently fails to deliver the goods and reships them to consignor, 800.

Of baggage—

Delivery of, to wrong connecting carrier, liability of preceding carrier for, 1282.

Delivery of baggage at destination, 1284.

Passenger allowed reasonable time to call for baggage, 1285.

During such reasonable time, liability of carrier, as such, continues, 1285.

Reasonable time as to delivery of baggage not the same as that allowed owner of goods to remove same, 1285.

Reasonable time is less than reasonable time for removal of freight, 1285, 1286.

Reasonable time, what is, 1286.

Reasonable time usually such time as will be reasonably necessary, considering opportunities afforded for removal, for passenger to present check and take baggage into his custody, 1286.

Whether removal must be on day of arrival, 1284, 1286, 1287.

If passenger arrive at destination in nighttime, he cannot delay removal of baggage during remainder of night, 1286, 1288.

Reasonable time, what is, usually a mixed question of fact and law, 1285, note 5.

Reasonable time, dissent from prevailing construction of, 1290.

Liability, carrier not released from, by failure of passenger to call for baggage, 1291.

In such case he becomes liable as a warehouseman, 1291.

Warehouseman, liability of, in such case, implied from contract to carry, 1292.

When through contract to carry passenger to destination, initial carrier liable for loss of baggage in hands of subsidiary carrier holding as warehouseman, 1292.

[REFERENCES ARE TO SECTIONS.]

DELIVERY BY CARRIER—*Of baggage*—con.

Trunk, where delivered to passenger, and same is immediately redelivered to carrier's station agent for temporary keeping, carrier no longer liable in any capacity, 1291, note 15.

Baggage-room, must be maintained in reasonably safe condition, 1291, note 15.

Baggage-room, whether kept reasonably safe, held question for jury, 1291, note 15.

Strict liability preserved where it is not usual custom for carrier to immediately deliver baggage, 1293.

Or where delay in removal is occasioned by carrier, 1293.

Fact that trunk arrives on later train than that conveying passenger, held evidence of negligence, 1294, note 17.

Delivery of baggage at destination to transfer company, when liability of carrier will terminate, 1294.

Delivery of baggage by transfer company, when such company's liability as an insurer will terminate, 1294.

Delivery, passenger has right to demand and receive his baggage at any regular stopping place, 1295.

But mere privilege to stop off over night at an intermediate station will impose no duty on carrier to unload and reload baggage, 1295.

DELIVERY TO CARRIER—

In general—

The delivery must be complete, 105.

Mere deposit in inn-yard from which he starts, insufficient, 105.

Must be to carrier himself or proper agent, 105, 111.

Whether particular person authorized to receive goods, question for jury, 106.

Not sufficient when made to agent not authorized to receive it, 107.

Delivery to deck hand of boat not sufficient, 107.

Delivery to person apparently employed in receiving and handling freight or baggage, 107.

Delivery to carrier by agent of shipper, 108.

When owner retains control, carrier not liable unless loss occurs through his negligence, 109.

Then not as common carrier, but as ordinary bailee for hire, 109, 110.

[REFERENCES ARE TO SECTIONS.]

DELIVERY TO CARRIER—*In général*—con.

Not necessary in all cases to make delivery at appointed place, 111.

Delivery of goods to driver of coach not at company's office, insufficient, 111.

Unless warranted by usage, 111.

Driver may receive passenger's baggage anywhere on route, 111.

Or goods at station where there is no officer or agent, if company carrier of goods, 111.

Delivery must be for immediate transportation—

Where goods stored for certain time or till happening of certain event, depositary not liable as common carrier, 112, 122.

When condition fulfilled, responsibility as carrier begins, 112.

When goods delivered for immediate transportation subject only to delays incident to carrier's business, responsibility as carrier begins immediately, 113.

When goods delivered solely for transportation, responsibility begins immediately, 113.

Delivery with name and address of consignee on goods, sufficient unless course of dealing has been otherwise, 113.

Carrier liable only as warehouseman when goods detained by order of consignor, 113.

When placing of live stock in carrier's pens or yards will impose duties of common carrier, 114.

Constructive delivery—

Delivery may be at place and in mode sanctioned by usage or agreement, 115, 116.

Usage to receive baggage in certain mode will not always justify delivery of freight in same manner, 117.

Delivery on dock by or near boat should be accompanied by notice to carrier, 117.

Doctrine of constructive delivery without notice should be applied with great caution, 118.

When delivery complete—

Complete when goods are accepted by carrier, 119.

Must be complete surrender of custody and control, 119.

To ship or vessel as soon as master, mate or other agent receives goods, 120.

Not necessary to put on board to fix liability, 120.

[REFERENCES ARE TO SECTIONS.]

DELIVERY TO CARRIER—*When delivery complete—con.*

Putting on barge, lighter or other vessel by carrier to be conveyed to his ship or boat, sufficient acceptance, 120.

Delivery of freight to railroad and express companies usually made at offices, warehouses or stations, 121.

Notice must be given to carrier before delivery complete, 121.

Knowledge of agent or carrier equivalent to notice, 121.

Notice of person placed by carrier in such situation as to induce shipper to believe he is authorized to accept, sufficient, 121.

Not always necessary that delivery should be made at office or other place designated by carrier, 121.

May be made wherever proper agent agrees to accept, 121.

Agent may refuse to accept at unusual place, 121.

Agent accepting in the absence of fraud, carrier bound unless such acceptance inconsistent with general objects and business of carrier, 121.

A mere switch not a depot at which delivery may be made to carrier, 121, note 12.

Carrier not compelled to stop to take on goods except at regular stations, 122.

Railroad company not responsible for "wayside deposit," 122.

Even when freight conductor agrees to stop train and take goods, 122.

In absence of custom, express companies need accept goods only at regular places of business or on lines of travel, 123.

Liability of carrier begins as soon as he commences to remove goods from conveyance of another carrier, 124.

Delivery to carrier when goods are loaded by owner, 125.

Delivery complete when owner has done all that is required by contract or usage and carrier notified, 125.

When acceptance will be implied, 126.

Checking, memorandum or entry on way-bill not necessary to complete delivery, 127.

Carrier responsible for baggage left at usual place by passengers intending to proceed on next train, 127.

But not when carrier has no notice that owner intends to become passenger, 127.

Liability of ferryman as common carrier, 128.

When delivery to ferryman deemed complete, 128.

[REFERENCES ARE TO SECTIONS.]

DELIVERY TO CARRIER—con.

Delivery to connecting carrier to complete transportation—

Unless bound to carry to destination, first carrier discharged when goods safely delivered to next succeeding carrier, 129.

Duty of first carrier to effect such delivery, 130.

Must at least make a tender of delivery, 130.

Failure to deliver to designated connecting carrier a conversion, 130.

Duty of initial carrier when goods are perishable, 130.

Duty of initial carrier to transmit instructions or conditions as to goods to succeeding carrier, 130, 140.

As to owner, actual change of possession necessary to shift responsibility to succeeding carrier, 131-137.

How when succeeding carrier refuses or neglects to receive goods, 132.

How duty to make delivery to a succeeding carrier affected by usage, 133.

As between carriers, constructive delivery may be sufficient, 134.

But as to owner of goods, doctrine of constructive delivery has no application, 134.

Carrier whose duty it is to make delivery presumed to be in possession till contrary shown, 134.

Delivery by railroad company to steamship company on wharf of latter, 137.

Owner may recover of connecting carrier to whom goods have been constructively delivered, 138.

First carrier as forwarding agent for owner, 139.

Of baggage—

Delivery of baggage to steamship company on representation of agent that it will be placed in stateroom when received, 72, note 60.

Passenger carrier common carrier as to passenger's baggage, 93, 1241.

Delivery to person whom passenger sees handling baggage, 106, note 10.

No delivery where owner retains custody of baggage, 109.

Driver of coach may receive passenger's baggage anywhere on route, 111.

Carrier liable only as warehouseman when baggage delivered, but not for immediate transportation, 112, note 23.

[REFERENCES ARE TO SECTIONS.]

DELIVERY TO CARRIER—*Of baggage*—con.

Place of delivery of baggage to common carrier may be fixed by usage, 116.

Usage to receive baggage in certain mode will not always justify delivery of freight in same manner, 117.

Leaving baggage on pier without directions will not give maritime lien on vessel for its loss, 120.

Custom of checking has no effect upon character of delivery to carrier, 127.

Baggage held only as ordinary freight where delivered to carrier without giving notice of intention to become passenger, 127.

Placing baggage in common baggage room not delivery to connecting carrier, 131, note 13.

When carrier's liability, as such, for safety of baggage begins, 1281.

Question will frequently depend on carrier's manner of doing business at particular station, 1281.

Authorized agent, baggage must be accepted by, to impose on carrier liability of an insurer, 1281.

Mere placing of trunk at entrance to baggage-room not sufficient to constitute a delivery to carrier, 1281.

Mere placing of baggage on wheeled truck on station platform, not sufficient to constitute a delivery to carrier, 1281.

Baggage-master, implied authority of, concerning baggage, 1256.

Baggage-master has no implied authority to contract for carriage of baggage beyond terminus of his employer's route, 1256, note 35.

Baggage-master has implied authority to accept baggage for a reasonable time before train departs, or before ticket is purchased, 1256.

Carrier not liable for baggage, as common carrier, unless absolute possession and control be given to him, 1257, 1260, 1261, 1262.

This rule does not apply where passenger retains partial control for purposes of journey, 1258, 1259.

English cases; question of delivery to carrier, 1259.

American cases; carrier liable only for negligence where baggage retained in custody of passenger, 1264.

[REFERENCES ARE TO SECTIONS.]

DEMAND—

For goods must be made of common carrier before an action can be maintained, 701, note 14.

DEMURRAGE—

Meaning of demurrage, 832.

Damages in the nature of demurrage, 832.

Measure of damages in case of improper detention of vessel not fixed and certain, 832.

If vessel not employed, no damages sustained, 832.

Where vessel detained with full crew and cargo, expenses going on, earnings furnish decided assistance in determining damages, 832.

Where demurrage days provided for and a rate of demurrage agreed on, that rate is *prima facie* the standard for measuring shipowner's loss, 832.

Prior agreement as to rate of demurrage not changed by delivery of bill of lading stipulating for different rate by mistake, 832.

Stipulated rate agreed on for delay in delivering cargo to vessel is *prima facie* evidence of loss by an unexcused delay in loading, 832.

If charterer binds himself absolutely to load or unload within a certain time, he takes the risk of all unforeseen circumstances, 833.

Bears risk of delay from crowded state of harbor, 833.

Or bad weather preventing access to vessel, 833.

Immaterial whether shipowner is also prevented from doing his part of work, unless in fault, 833.

Strike of dock laborers not caused by unreasonable conduct of shipowners will not relieve charterer where absolute promise to pay demurrage, 833, note 47.

Where cargo to be delivered within reach of ship's tackle, charterers not exempted by breakdown of lighter, 833, note 47.

Stipulation for definite lay days makes charterer responsible for delay from loss of machinery for loading by fire, 833, note 47.

Delay through waiting for berth not "a cause or accident beyond the control of consignees," 833, note 47.

Delay caused by actual firing of guns from enemy's ship of war upon forts in harbor not a detention "by default of" charterers, 833.

Clauses in bill of lading providing for special demurrage should be strictly construed, 833.

Even though time for work definitely fixed, charterer or consignee not liable for delay caused by the default of ship-owner, 834.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Consignee not liable for delay due to delivery from one only of two hatches of ship, 834.

Or for delay due to insufficient number of men being hired by ship-owner for his part of work, 834.

Or where stevedoring is done by an employe of the ship's agent, 834.

So ship cannot claim demurrage for delay caused by observance of stipulation inserted for ship-owner's benefit, 835.

Where stipulation that vessel shall be loaded only when she can be kept afloat, time lost in waiting for necessary tides and depth is lost to shipowner, 835.

Rule when delay is due to customs officers, 836.

What are counted as lay days, 837.

"Days" alone includes all running or successive days, including Sundays and holidays, 837.

When Sundays alone excepted, charterers not exempt from demurrage for holidays and days on which laborers will not work, 837.

Days not excepted on which laborers refused to work owing to storms, 837, note 55.

Or on which labor organizations attended a funeral, 837, note 55.

Or for celebration of Labor day, 837, note 55.

Half holidays not made obligatory by statute usually not excepted, 837, note 55.

"Working days" means running or calendar days on which law permits work to be done, 837.

Excludes Sundays and legal holidays, but not stormy days, 837.

Does not include time taken by laymen in attending funeral, or cessation of work on Good Friday, 837.

When expressions "weather working days" or "with customary dispatch" used, 837.

If vessel commences to load or discharge in middle of day, day's time is computed at end of that day, and not at expiration of twenty-four hours, 838.

But charter party or bill of lading may provide that demurrage is to run on fraction of a day, 838.

How when only part of a "weather working day" is used on account of weather, 838.

Twenty-four hours may constitute "weather working day" in some places, 838, note 61.

Agreement for "quick dispatch" overrides any customary mode of doing the work, 839.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Under such agreement, demurrage allowable for delay in giving security for freight, 839.

No excuse to show that, by custom of port, vessels took their turn in securing berth, 839.

Agreement to discharge with all dispatch according to custom of port not necessarily same as obligation to discharge in a reasonable time, 839.

Words "as customary" or "with all dispatch as customary" refer to customary manner of doing the work, and not to time for doing it, 839.

Ordinary provision for dispatch in discharging is construed with reference to customs of port where discharge is made, 839.

"Customary quick dispatch" as to sugar may require platform scales for weighing, 839.

Stipulation for "customary dispatch" fulfilled if customary facilities afforded, 839.

If customary facilities afforded, delay caused by misapprehension of stevedores not chargeable to charterer, 839, note 70.

But "customary dispatch" does not include voluntary delay on part of charterers, 839.

"Customary dispatch" includes usages as to working hours, 839.

As to order in which vessels must come up to wharf, 839.

As to observance of holidays, 839.

But does not include usage as to delay in auction of fruit, 839.

Nor detention to suit the convenience or business purposes of consignee and consignee, 839.

When consignee can use two sides of vessel for loading or unloading he should do so, 839, note 72.

Use of weighers who should be employed in discharging one vessel on other vessels renders consignees liable for demurrage, 839, note 72.

Agreement to load or discharge "as fast as steamer can deliver" not tantamount to fixing certain definite number of days or hours, 840.

Such words not controlled by custom of port fixing rate of discharge at less amount than ship's full capacity, 840.

Charterers liable where only three out of four hatches used, 840, note 1.

Such a clause not affected by weather conditions, even if adverse, 840.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Not complied with by providing wharf at which only one of several hatches can be used, 840.

Weather exceptions in such a clause refer to weather at port of loading or discharge, and not elsewhere, 840.

Competent in charter party to provide exceptions in case of delay, ascribable to specified causes, such as quarantine, flood, storms, strikes, etc., 841.

Courts will give reasonable meaning to exonerating language, 841.

When demand by workmen for an advance in wages is a "strike" within meaning of charter party, 841.

When "strikes" excepted, immaterial that strike was brought about by demand of charterer that workmen conform to certain reasonable rules and regulations, 841.

Delay owing to large number of foreign vessels unloading coal on account of domestic shortage caused by strike of miners, not within exception of "strikes," 841.

Exception against "strikes" not affected by fact that strike is in progress at time contract is signed, 841.

Drought which does not in any way affect the delivery of cargoes from the place of storage to the ship does not come within exception of "droughts," 841.

"Political occurrences" which prevent the charterer from procuring a cargo, but not from loading, do not relieve him from liability for demurrage, 841.

Refusal of captain of port to permit vessel to berth in her turn is an "intervention of constituted authorities," 841, note 12.

In England exception against "political disturbances or impediments" held to apply to impossibility of keeping railways running owing to civil war, 841.

When particular exceptions followed by more general and comprehensive words of exception, latter construed to embrace only occurrences *ejusdem generis* with those previously enumerated, unless clear intent to contrary, 841.

Inability to obtain sufficient number of laborers not *ejusdem generis* with lockout, 841.

Demurrage, strictly speaking, recoverable only when expressly reserved by charter or bill of lading, 842.

But when contract silent as to time of loading or discharge, implied obligation arises to load or discharge with reasonable diligence, 842.

Reasonable time depends upon circumstances, 842, note 15.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Where contract is silent as to time of discharge, strike will excuse charterer, 842, note 15.

In absence of custom, reasonable rate not necessarily the same at all wharves and under all circumstances, 842, note 15.

Failure to fill blanks as to demurrage, rule as to reasonable dispatch applies, 842, note 15.

Burden on him who seeks to recover damages for delay to prove charterer did not exercise reasonable diligence, 842.

Proof that vessel was delayed beyond customary time throws on charterer burden of excusing delay, 842.

To be valid, a custom of a port as to rate of discharge must be certain; cannot fluctuate, 842, note 18.

Diligence at different times cannot be averaged, 842.

Demurrage not allowable for contemplated delays, 843.

Failure of charterer to live up to his agreement to attend to entering of ship at custom house chargeable to him, 843, note 20.

Charterer liable for delay caused by loading and unloading goods erroneously designated as part of cargo, 843, note 20.

Work of loading or discharging a ship usually a joint obligation on part of shipowner and charterer or consignee, 844.

But when work left entirely to third person, or dock company, charterer or consignee, when bound only to reasonable diligence, not liable for delay caused by third person or dock company, 844.

Strict obligation on part of charterer to have cargo ready for loading, 845.

Except where duty to do so has been modified by a controlling usage, 845.

Or has been expressly excused, 845.

When only a chance of berth becoming vacant, there may be no obligation in some cases on part of charterer to have cargo on quay, 845.

On other hand, in some cases it might be the duty of the charterer to prepare the cargo so as to enable the ship to obtain an earlier berthing, 845.

Charterer bound to provide such appliances for loading or unloading as are in ordinary use at the port for the kind of cargo to be handled, 846.

Where only one set of apparatus for unloading is available, a usage of the port controlling that apparatus will be binding on shipowner, 846.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Vessel has the right to assume that dockage for piling cargo will be supplied with reasonable promptitude by charterer, 846.

Rule different as to vessel's rights against a consignor, not a charterer, 846.

Whether shipowner bound to supply electric lights, 846, note 27.

Charterers using every endeavor to procure necessary customary port appliances, not liable for delay in securing those appliances due to causes beyond their control or constituted port authorities, 846.

"In regular turn" *prima facie* means regular turn at port of lading, 847.

But it may be shown that words were intended to have a different meaning, 847.

Vessels arriving first entitled to priority in loading, 847.

Custom of local port that vessel should wait her turn is valid, 847.

But usage cannot control express stipulation as to order of being loaded, 847.

Provision that vessel should be loaded by coal company "in turn," not affected by practice of company to give preference to its own customers, 847.

Or to sell coal to local dealers from supply which would otherwise be available for loading, 847.

If bill of lading fails to designate wharf or berth, vessel's right to precedence subject to consignee's designation of wharf, 847.

But consignee not thereby given an arbitrary right, 847.

Special circumstances may be shown to justify the consignee directing vessels, in their turn, to the first berths available, 847.

Necessity of notice of vessel's readiness to receive cargo, 848.

Lay days do not begin to run until such notice given, 848.

Vessel must be ready and at her proper place for loading before notice can properly be given, 848.

In England, master not bound to notify the charterers or consignees of the arrival of the goods, 848.

But in the United States, notice to the charterers or consignees is necessary even at port of discharge, 848.

Shipowner liable for delay in bringing vessel to berth given her, 848.

Consignee not liable for delay due to vessel arriving on a legal half holiday, 848.

No obligation on part of consignee to keep his office open on a legal half holiday, 848.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Cases in conflict on question of where ship ought to be lying for lay days to commence, 849.

Earlier cases held vessel must be in position where charterer could begin to do his part of the work, 849.

Later cases give a wider latitude to vessel, 849.

If contract for shipping generally to a certain port, conditions of delivery at public docks must be considered, 849.

When shipment to party having known special facilities that fact determines question of reasonableness, 849.

When obligation to deliver at particular dock, voyage not completed until designated place reached, 849.

When vessel to proceed to berth "as ordered," charterers given option in choice of berth, 850.

If strike prevents going to certain berth, charterers not liable for delay in ordering to another berth, 850.

Nor will charterers be liable for delay due to crowded condition of dock, 850.

Two or three hours after notice of arrival is a reasonable time within which to designate berth, 850.

Master may refuse to go to unsafe designated berth, and hold consignee for the delay, 850.

But demurrage not allowable where vessel cannot reach designated berth on account of overloading, 850.

If accident to vessel while waiting on demurrage, obligation to pay demurrage is suspended while vessel is away for repairs, but resumed on her return, 851.

Immaterial that quay berth falls vacant during her absence, 851.

Charterer not liable for delay without his fault after loading completed, 852.

Not liable where vessel frozen in while being loaded, and detained on that account after loading completed, 852.

But charterers liable for detention in loading beyond a reasonable time, although even if loaded on time, ship would have been prevented by ice from sailing earlier, 852.

Consignee, by merely accepting goods, does not become liable for payment of demurrage, 853.

But consignee, who is also owner, liable for damages in nature of demurrage when vessel detained at port of discharge unreasonably through his fault, 853.

In such case, nature of damages must be proved, 853.

Liability of indorsees of bills of lading for damages in the nature of demurrage, 853, note 55.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

- Where consignee fails to take cargo within a reasonable time, he remains liable for damages from undue delay, 853, note 55.
- Liability of consignee who accepts bill of lading containing demurrage clause, 853, note 55.
- If consignee is owner of goods and enters into contract with carrier, that contract will govern, although shipper stipulates in bill of lading for different rate of demurrage, 853, note 55.
- Rights of master at wharf of assignee of bill of lading do not differ from his rights at wharf of consignee, 853, note 56.
- Effect of "cesser" clause in charter party, 854.
- Cesser and lien clause to be read as co-extensive, 854.
- Shipowner not entitled to demurrage where delay is due to his own default or that of master of vessel, 855.
- Demurrage not allowable where master wrongfully refuses to receive all the cargo contracted for, 855.
- Or where delay occurs through mistaken claim of master that bills of lading are incorrect, 855.
- Consignor liable for demurrage on account of delay caused by refusal of consignee to receive cargo for reasons not connected with some default of carrier, 855.
- Or for delay arising from refusal of consignee to receive cargo because damaged by an excepted peril, 855.
- But consignor not liable for demurrage where refusal of consignee is due to damages through a non-excepted peril, 855.
- Charterer not liable for delay due to master's absence from vessel, 855.
- If master refuses to deliver goods until admittedly extortionate charge for demurrage is made, consignee may abandon goods, and recover their value, less lawful charges, 855.
- No demurrage allowable for delay through arbitrary stoppage by master until security given, 855.
- Master cannot detain goods on board for non-payment of freight, or general average, and charge demurrage, 855.
- Quasi* demurrage for a reasonable sum might be allowable under such circumstances, 855.
- No lien at common law for demurrage, 856.
- Otherwise by maritime law, 856.
- Lien may be waived, 856.
- Waivers of claim for demurrage, 857.
- Delivery of cargo and collection of freight money not a waiver of claim for demurrage, 857.

[REFERENCES ARE TO SECTIONS.]

DEMURRAGE—con.

Presentation of bill for smaller amount not necessarily a waiver of larger claim, 857.

Nor acceptance of smaller amount by master under protest, 857.

Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

Liability of consignee for detention of cars where duty to unload the goods devolves on railroad company, 858.

Where duty to unload cars devolves on consignee, if he fails to do so, railroad company may demand reasonable compensation for use of its cars, 859.

Term "demurrage," as used by railroad companies, not used in its technical sense, 859, note 20.

What rules of railroad company as to removal of goods by consignee are reasonable, 859, note 20.

Distance freight must be hauled from cars should not be considered, 859, note 20.

When time fixed for consignee to unload has expired, excuses, such as weather, will not avail, 859, note 20.

Initial carrier must actually tender goods to connecting carrier before he can charge demurrage, 859, note 20.

Acceptance of receipt by shipper containing provision for demurrage charge will create a binding contract, 860.

Shipper may be bound by reasonable rule or regulation of railroad company imposing demurrage charge, although no notice of it inserted in receipt or bill of lading, 860.

Reasonable rules and regulations of car service associations will be upheld, 861.

Such associations are not inimical to the public welfare, 861, note 3.

Lien of railroad company on goods to secure charges in the nature of demurrage, 862.

If consignee wrongfully refuses to pay such charges on a carload of lumber, the railroad company may seal the car and place it beyond consignee's control, 862, note 6.

DEPARTURE—

From stipulated method of transportation defeats contract of exemption, 480.

Sending goods by another route in order to mitigate damages, 480.

[REFERENCES ARE TO SECTIONS.]

DEPOTS (See STATIONS; STATIONAL FACILITIES; PLATFORMS)—

Construction of words "while at depots" in limitation of liability will be against carrier, 464.

DERAILMENT—

Of train, *prima facie* case of negligence, 1414.

DERRICK—

Liability of connecting carrier attaches when transfer is commenced by means of derrick, 124.

Evidence that derrick for unloading goods was out of repair competent to show relation as common carrier had not ceased, 705, note 34.

Liability of passenger carrier for negligence in use of derrick by independent contractor, 919.

Liability of railroad company where stone, attached to derrick, is swung into passing train, 925.

DESERTION—

Of seamen not a peril of the sea, 490, note 65.

DESIGNATION OF GOODS—

Effect of erroneous designation of goods by employe of charterer, 843, note 20.

DESTINATION—

When destination may be altered by shipper, 193-196, 660.

But carrier entitled to full freight for entire distance if goods diverted at intermediate point, 660.

When refusal of carrier to change destination will amount to a conversion, 660, and notes.

Right of owner to terminate carriage short of destination, 661.

Carrier may be estopped in such case by usage from demanding full freight, 661.

When delivery at wrong place is deemed a conversion, 680.

Generally consignee may direct delivery at place other than that appointed by consignor, 735.

But not where title vests in consignee on performance of certain conditions, 735.

Consignee cannot change destination when known to be mere agent, 736.

DETENTION—

Of passenger, damages for, 1428, 1429.

Liability of consignor, consignee or charterer for detention of vessel or cars, see DEMURRAGE.

[REFERENCES ARE TO SECTIONS.]

DEVIATION (See ROUTE)—

Liability of private carrier for hire or common carrier for deviation, 53, note 10.

Responsibility of carrier in case of loss arising from deviation during voyage, 294-296.

Goods taken by public enemy during deviation, carrier responsible, 319.

Whether carrier may show that loss would have happened without his deviation, 320, 321.

Effect of Harter Act on deviation, 386.

Effect of departure from stipulated method of transportation, 480.

Sending goods by another route in order to mitigate damages, 480.

Tempestuous weather may render deviation necessary, 616.

Liability of carrier where, notwithstanding an unauthorized deviation, the goods arrive on time, 621.

Effect of general words permitting deviation used in a printed form, 622.

Deviation to avoid delay, 656.

DEW—

Delay through fall of, 653, note 22.

DILIGENCE (See CARE; NEGLIGENCE)—

Apportionment of diligence according to benefit to bailor or bailee, 8.

Comparative degrees of diligence and negligence, 10.

Utility of this classification, 11.

Degree of diligence required of private carrier for hire, 37.

A state may require care and diligence of carrier, although contract is one for interstate carriage, 209.

The degree of diligence to be exercised by the carrier when the goods have been overtaken by disaster, 309, 310, 311.

"Due diligence" under the Harter Act, 363, *et seq.*

Burden of proof on carrier under Harter Act to prove due diligence was used to make vessel seaworthy, 367.

Proof of inspection of general character not sufficient to prove due diligence, 380.

Possession of surveyor's certificates of not great importance in proving due diligence to make vessel seaworthy, 380.

What is due diligence in manning vessel, 381.

[REFERENCES ARE TO SECTIONS.]

DILIGENCE—con.

Use of Chinese crew may show lack of due diligence in manning vessel, 381.

Gross negligence of master will raise presumption of negligence in his selection, 381.

Care and diligence to be used concerning goods during transportation, 631-633.

Care and diligence necessary by carrier in preservation of goods, 646.

What is reasonable diligence in delivery by carrier is a question of fact, 667.

Diligence required of carrier in giving notice to consignee, 695.

Diligence of charterer in loading or unloading cannot be averaged, 842.

When party contracting to supply freight or cargo to carrier, has failed to do so, carrier must use due diligence to procure other freight to complete cargo, 863.

DIRECTIONS—*Common carrier*—

Direction to notify certain person does not dispense with production of bill of lading, 187.

Effect of directions as to method of transportation of goods, 333.

Carrier accepting goods with directions to carry in particular mode or by particular route, bound to follow such directions, 611.

If goods are not shipped according to directions, carrier liable even though loss occurs on connecting line, 611, note 42.

But carrier not liable for deviation from instructions when safety of goods requires it, 612.

Or in effort to mitigate damages after loss or damage on contract route, 612.

So carrier not liable for losses resulting from following directions, 612.

Absence of special instructions gives carrier choice as to route, 613, note 53.

Bailor may countermand any directions as to consignment so long as he remains owner of the goods, 660.

Where carrier holds under instructions till goods paid for, and consignee promises to pay for and take away goods within a few days, he becomes warehouseman, and is liable only as such, 722.

[REFERENCES ARE TO SECTIONS.]

DIRECTIONS—*Common carrier*—con.

Effect the same when consignee absent, or after reasonable diligence cannot be found, 723.

Directions to forward goods C. O. D., 726, *et seq.*

Generally consignee may direct delivery at place other than that appointed by consignor, 735.

But not where title rests in consignee on performance of certain conditions, 735.

Consignee cannot change destination when known to be mere agent, 736.

Change cannot be made after transportation completed, 737.

Passenger carrier—

Entering freight train at direction of station agent, 964.

By agent of carrier, when will excuse conduct of passenger in attempting to alight from moving train, 1177.

By agent of carrier, when will excuse conduct of passenger in attempting to board train while in motion, 1181.

Effect of, on conduct of passenger in leaving or boarding train elsewhere than at station platform, 1185, 1186.

Effect of, on conduct of passenger in occupying exposed position on vehicle, 1195.

By conductor, to leave platform and go within car, should be obeyed, 1198, note 42.

Effect of, on conduct of passenger in riding in baggage car, 1200.

How far negligence of passenger excused by directions of carrier or his servants, 1221.

Directions of carrier's authorized agent will ordinarily excuse passenger's conduct, unless such directions lead to known and obvious danger, 1221.

But to excuse conduct of passenger, directions by agent must have been given while acting within scope of employment, 1222.

Where life of passenger in imminent peril, passenger may rely on directions of agent ordinarily without authority to direct passengers, 1222.

DIRECTORY—

Looking into city directory for name of consignee insufficient of itself to show due diligence on part of carrier in delivery, 667.

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—

- Against shipper in forwarding goods, defeats contract of exemption, 480.
- But notorious usage may determine whether there has been a departure from contract, 480.
- Carrier cannot discriminate in apportionment of vehicles in favor of one station or shipper, 495.
- Discrimination by common carrier unlawful, 512.
- Difference in situation of shippers may justify a preference, 513.
- Whether railroad companies are bound to furnish facilities to express companies without discrimination, 514.
- Authorities in conflict on this question, 514-516.
- The "Express Cases" in the United States Supreme Court, 517.
- Giving preference to one connecting carrier over another, 519.
- Giving preference to one shipper over another, 520.
- Rates must be reasonable, 521.
- Must not be unjustly discriminative, 521.
- Mere inequality of charges not unjust discrimination, 521.
- Secret rebate unlawfully discriminative, 521.
- The English rule, 522.
- Text of Interstate Commerce Act, 523.
- Discriminative interstate contracts void under Interstate Commerce Act, 537.
- Even when rates given by mistake, 537.
- Discrimination must be unjust, 538.
- Milling in transit agreement not necessarily discriminative, 538.
- Compressing cotton in transit need not amount to unjust discrimination, 538.
- Contract is governed by classification sheet in force at date of shipment, 537, note 39.
- Shippers must be placed on an absolute equality, 539.
- Special rebates void, 539.
- A lower through rate not necessarily discriminative, 540.
- Discrimination may be in passenger service, as well as property, 541.
- Contract of railroad company with ticket broker to sell tickets at less than regular rate is void under Interstate Commerce Act, 541.
- Likewise as to pass issued as a personal favor, 541.
- Rebate equal to cartage charges is discriminative, 545.

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—con.

Payment of carrier's prior debt by carriage as discrimination, 546.

Agreement for rebate does not void contract of carriage, 547.

Effect of section two of Interstate Commerce Act on limitations on the value of goods in bills of lading, 548.

Question of relative rates is involved in section two, 549.

Failure to pay expenses no excuse for unjust discrimination, 550.

Third section of Interstate Commerce Act modeled on English act, 551.

Section three embraces every form of unjust discrimination, 552.

Relative rates important under section three, 552.

Questions of undue or unreasonable prejudice or preference are questions of fact, 553.

Origin of goods immaterial under section three, 554.

Carriage of articles or commodities manufactured, mined or produced by carrier, 555.

Section three applies to timber and manufactured products thereof which are excepted by section one, 555.

Railroad cannot build up one port at expense of another by preferential rates, 555.

Discrimination in carriage of live stock and affording proper facilities under section three, 556.

Discrimination in coal car distribution under section three, 557.

Agreement between railroad company and shippers as to coal car distribution cannot do away with obligations of section three, 557, note 21.

Effect of shipper furnishing cars, 557.

Third section applies as well to passenger as to freight traffic, 558.

Real and substantial competition justifies dissimilarity in rates under third and fourth sections of Interstate Commerce Act, 559.

Third section does not relate to acts, the result of conditions beyond control of carrier, 560.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Interests of shipper, carrier and public should be considered, 563.

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—con.

Rules as to competition summarized, 564.

Condition that initial carrier shall have right to route beyond its own terminal is valid, 565.

Joint rate is not a basis for local rate, 566.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Discrimination in affording facilities for interchange of traffic, 568.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Railroad need not afford same facilities to rival as to its own branch line, 568.

Mere distance no criterion of "substantially similar circumstances and conditions," 568.

Company transporting partly by railroad and partly by water not obliged to allow competitor use of its wharf, 568.

Question of similarity or dissimilarity of circumstances under section four is one of fact, 569.

Real and substantial competition a factor under section four, 570.

"Basing point system" is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Joint rate for long haul should not be less than local rate for short haul, 573.

State legislatures have power also to prevent unjust and unreasonable discrimination by carriers operating within the state, 574.

But power to regulate is not power to destroy, 574.

Discrimination to be actionable must be unjust, 588.

Difference in commodity or method of handling it may justify different charge, 588.

A special rate is not always unjustly discriminative, 589.

Free passes are discriminative, 591.

A "rebilling" rate may be discriminative, 590.

An extra charge may be made for shipments received off carrier's own line, 592.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Right of carrier to recover from the shipper the difference between the discriminative and regular rate, 594.

[REFERENCES ARE TO SECTIONS.]

DISCRIMINATION—con.

Through rate may be less than sum of locals, 595.

Discrimination between localities, 597.

Whether competition is a material factor as between localities, 597.

Special contracts with shippers not impossibilities under long and short haul clause, 600.

Discrimination in fare in favor of commercial travelers unjustifiable, 1030, note 19.

DISEASE (See SICKNESS)—

Exception against loss of animals from disease will not excuse carrier when latter is negligent, 492, note 70.

Liability of carrier for furnishing cars for live stock affected with any contagious disease, 509.

DISORDERLY PERSONS—

Carrier may refuse to carry as passengers, 966 *et seq.*

Ejection of, for misconduct, 974 *et seq.*

DISPATCH COMPANIES—

Common carriers cannot escape liability by assuming name of "dispatch companies," 84.

No joint liability when similar contracts are entered into by several railroads with same dispatch company, 259.

DISPUTES—

Between passenger and conductor, how settled, 1065.

DISTANCE—

Of consignee's place of business from railroad station, no excuse as against railroad company's claim for demurrage, 859, note 20.

DISTRESS OF MIND (see MENTAL SUFFERING)—

Widow may recover for, where carrier negligently delays shipment of body of her deceased husband, 1375.

DIVERSION OF GOODS—

Right of owner of goods to divert them in transit, 660.

DOCK—

Constructive delivery on dock or wharf to carrier, 115.

Delivery on dock by or near boat should be accompanied by notice to carrier, 117.

On question of demurrage, if contract is for shipping generally to a certain port, conditions of delivery at public docks must be considered, 849.

[REFERENCES ARE TO SECTIONS.]

DOCK—con.

When obligation to deliver at a particular dock, voyage not completed until designated place reached, 849.

When charterers not liable for crowded condition of dock, 850.

Duty of passenger carrier by water to provide safe and suitable docks, and to moor safely to, 942.

DOCKAGE—

Vessel has the right to assume that dockage will be supplied with reasonable promptitude by charterer, 846.

DOCK COMPANY—

Effect of leaving loading or unloading to dock company on ship-owner's right to demurrage, 844.

DOG—

Liability of railroad company for dog carried in violation of its rules, 91.

If, through failure of owner to properly attend it, dog dies from overstrained bladder, carrier not liable, 342, note 1.

Liability of passenger carrier for injury to passenger by dog carried in passenger coach, 921, note 9.

Regulation excluding, from passenger cars is reasonable, 1077, note 17.

Carrier liable for loss of dog if accepted by baggage-master for carriage, 1250, note 16.

Acceptance of dog by baggage-master in violation of rule of company, no excuse if passenger without knowledge of rule, 1250, note 16.

DOOR—

Leaving door of passenger elevator shaft open and unguarded, negligence, 100, note 41.

Escape of live animals through door of car being negligently left open, 333, note 7.

Carrier of live stock liable for defective door in car, 509, note 46.

Liability of passenger carrier for defective doors on vehicle, 911. But railway company not bound to furnish glass doors, 911, note 22.

Injury to passenger's hand or fingers by sudden closing of door, when negligence, 927.

Passenger falling out while endeavoring to close door of car, 939, note 46.

[REFERENCES ARE TO SECTIONS.]

DOUBT—

Reasonable doubt of identity of consignee good excuse for refusal to deliver, 668.

DRAFT—

Attached to bill of lading, payment and protection of, 183, *et seq.*

See BILL OF LADING.

Acceptance of draft does not defeat vendor's right of stoppage *in transitu*, 765. *

"DRAINAGE"—

Meaning of exception against, 489, note 60.

DRAWING-ROOM CAR—

Railroad company liable for assault by porter of, 1095.

DRAYMAN—

Authority of drayman to bind owner to limitation, 457, note 9.

DRAYS—

Proprietors of, when common carriers, 68, 70.

DRESSING CASE—

When baggage, 1246, note 27.

DROUGHT—

Liability of carrier for damage to live stock owing to inability of carrier to supply stock with sufficient water, the carrier having had full knowledge of the drought then prevailing, 151, note 19.

Charterer may guard against liability for delay by droughts in charter party, 841.

Drought which does not in any way affect the delivery of cargoes from the place of storage to the ship does not come within exception, 847.

DROVERS—

Are not common carriers, 99.

Authority of drover to bind owner to limitation by acceptance of receipt, 457.

DROVER'S PASS—

Person riding on "drover's pass," entitled to protection as passenger, 1003.

Attempt to limit authority of carrier's agent by requiring him to impose limitation of liability void, 1003, note 29.

Effect of limitation of carrier's liability to his own line in contract, but not in "drover's pass," 1003, note 29.

Person traveling on "drover's pass" not charged with knowledge

[REFERENCES ARE TO SECTIONS.]

DROVER'S PASS—con.

of limitation of carrier's liability contained in contract between shipper and carrier, 1003, note 29.

Carrier by water liable to one carried on boat for purpose of caring for live stock for negligence in lighting boat, 1003, note 29.

Status of person traveling on "drover's pass" not changed by recital in contract that he is an employe of carrier while so traveling, 1003.

Does not come within fellow-servant rule, 1003, note 30.

But assumes necessary risks and inconveniences characteristic of vehicle on which he is traveling, 1003.

DRUNKEN PASSENGERS—

See INTOXICATED PERSONS.

"DUE DILIGENCE"—

What is, under Harter Act, 380.

Effect of, 363.

Burden of proof on carrier under Harter Act to prove due diligence was used to make vessel seaworthy, 367.

Proof of inspection of general character not sufficient to prove due diligence, 380.

Possession of surveyor's certificates of not great importance in proving due diligence to make vessel seaworthy, 380.

What is due diligence in manning vessel, 381.

Use of Chinese crew may show lack of due diligence in manning vessel, 381.

Gross negligence of master will raise presumption of negligence in his selection, 381.

DUE PROCESS OF LAW—

State regulation of rates must not amount to taking property without due process of law, 574.

DUMMY—

If first railroad is a dummy for a second railroad, the latter will be liable in damages to persons injured on first railroad, 264, note 23.

DUNNAGE—

Duty of ship to provide proper dunnage, 356, 602, note 18.

DUPLICATES—

Of bill of lading, variance in, 155.

Possession of duplicate not indorsed, 188.

[REFERENCES ARE TO SECTIONS.]

DUPLICATES—con.

Possession of indorsed duplicate obtained by fraud, 189.

Duplicate receipts, 190.

DURESS—

When excessive amount of freight charges may be recovered as paid under duress, 805, 806.

DYNAMITE—

Carrier not bound to accept for carriage, 145, note 3.

EARNINGS—

Of deceased, in actions for death by wrongful act, as affecting recovery, 1397, and note.

EARTHQUAKE—

Whether loss by, is act of God, 271, 283.

EASEL—

When baggage, 1244, 1254.

EATING—

Breach of table manners does not authorize ejection, 979.

EJECTION—

Ejection from freight train, 964.

When once accepted, a passenger cannot be ejected unless guilty of some misconduct, 974.

Not to be ejected for supposed bad character if properly conducting himself, 975.

Person cannot be ejected on ground he is a pickpocket without any act of misbehavior on his part, 975.

Or woman, conducting herself properly, cannot be ejected because of general bad character, 975.

When one passenger may be ejected for misconduct of another, 976.

Ejection of keeper with madman, or officer with prisoner, 976.

Ejection of father with adult son, 976.

Passenger may be ejected for misconduct interfering with comfort of other passengers, 977.

Or for interfering with business of carrier, 977.

In expelling passenger, carrier's servants act at their peril, 977.

If wrongfully ejected, misapprehension will afford carrier no excuse, 977.

Right to eject drunken passenger is subject to limitations, 978.

Care must be taken to expose person ejected to no unusual or unnecessary hazards, 978.

[REFERENCES ARE TO SECTIONS.]

EJECTION—con.

Conductor must use reasonable care and caution, 978.

May eject drunken passenger if it is reasonably certain he will become offensive or annoying to other passengers, 978.

Or if drunken passenger advises other passengers to refuse to pay fare, 978, note 36.

Or if he is guilty of using obscene and vulgar language, 978, note 36.

✓ But mere breach of table manners in being drunk does not authorize carrier to eject passenger, 978.

✓ So mere breach of table manners in eating does not authorize carrier to eject passenger, 979.

Right of carrier to eject on refusal to leave train which does not stop at destination, 1060.

Carrier liable if wrong person expelled for breach of regulations, 1081.

Passenger forfeiting right to carriage may be expelled at any point on the route, 1082.

Rule changed by statute in some states, 1082.

Passenger cannot be exposed wantonly to perils by ejection, 1082.

Rule in England as to ejection for non-performance of regulation, or non-payment of fare, 1082.

Ejection of females and sick or intoxicated passengers, 1083.

Regard must be had to the infirmities or disabilities of the person ejected, 1083.

Immaterial that condition was self-imposed, 1083.

Liability of carrier for assault on female passenger where ejected at station short of destination, 1083, note 13.

Carrier not liable if intoxicated person placed in position of safety, and afterwards wanders back on track and is killed, 1083.

✓ Right to eject must be exercised in a proper manner, 1084.

✓ Ejecting from slowly moving train not negligence *per se*, 1084, note 18.

Only such force as is necessary to be used, 1084.

Carrier liable for unnecessary force in expulsion, or circumstances of insult or indignity, 1084.

No greater damage because colored train hand assisted in expulsion of white man, 1084, note 19.

Ejection of colored man from white man's car, 1084, note 19.

Effect of tender after refusal to pay fare or show ticket, and ejection begun, 1085.

[REFERENCES ARE TO SECTIONS.]

EJECTION—con.

Cases not in harmony on this question, 1085.

Passenger cannot escape ejection by tendering fare for remainder of journey, 1085.

Or by buying ticket for remainder of way, 1085.

Rule justifying refusal to accept tender after ejection begun must be confined to cases where refusal was wilful, 1085.

Effect of tender of fare by third person, 1085.

Duty of carrier to tender back fare received before ejection, 1086.

Duty of carrier to tender back fare received when parent is ejected for non-payment of child's fare, 1087.

Duty of carrier to return ticket claimed to be void or worthless before ejecting passenger, 1088.

Passenger may resist ejection when attempt made to expel from train in rapid motion, 1089.

When attempt made to expel wrongfully, passenger may repel by use of any necessary force, 1090.

Passenger not compelled to purchase, even for trifle, right which he already has under ticket, 1090, note 2.

Where passenger in wrong, and injured while resisting ejection, carrier not liable, 1090.

Whether due care has been used in expulsion, a question of fact, 1091.

Carrier not always liable when passenger expelled while train in motion, 1091.

Always necessary to slacken speed so as to prevent injury, 1091.

Conductor cannot testify he did not use more force than necessary, that being a question for the jury, 1091, note 8.

Relation of carrier and passenger does not cease on wrongful ejection, 1092.

Carrier's duty extends to protecting passengers against acts of violence by passengers who have been ejected or have alighted, 988.

Where conductor violently threatens to eject passenger, negligence of passenger in attempting to alight from moving train will be excused, 1177, note 4.

Passenger wrongfully ejected from train, care to be exercised by, 1234.

Under such circumstances, presence on track not contributory negligence, 1234.

But passenger must leave track at earliest practicable opportunity, 1234.

[REFERENCES ARE TO SECTIONS.]

EJECTION—con.

Damages for mental suffering occasioned by, may be recovered, 1427.

When wrongful, sickness caused by, held too remote to be considered an element of damage, 1428.

But this rule not generally followed in this country, 1429.

When passenger wrongfully ejected from train, indignity, rudeness, insult or unnecessary force which accompanies act may be considered by jury in aggravation of damages, 1433.

When passenger wrongfully ejected from train, feelings of shame and humiliation endured, proper elements of damage, 1433.

When ejection not wrongful, carrier liable if unnecessary force or violence be used, 1433.

ELECTRIC LIGHTS—

Whether shipowner bound to supply electric lights for loading or unloading, 846, note 27.

ELEMENTS—

Whether loss by, is act of God 271.

ELEVATORS—PASSENGER—

Whether proprietors common carriers, 100.

Liability of owner of freight elevator carrying passengers, 100, note 41.

Must allow passengers reasonable time to enter or leave car, 101.

Duty as to doors, stools, speed, etc., 100, 101, 102.

Operation of automatic push-button, electrical passenger elevator, 102.

Passenger on, when guilty of contributory negligence will be barred from a recovery, 100, note 41.

ELKINS ACT—

Text given in full in notes to section 523.

EMBANKMENT—

Liability of passenger carrier for giving way of, 948, note 49.

EMBARGO—

Does not dissolve contract of carriage, 322.

Although it may delay carriage, 655.

Burden of proof on carrier to show transportation in reasonable time after embargo removed, 659.

EMBEZZLEMENT—

Carrier liable, notwithstanding exception against perils of the seas, for loss from embezzlement, 491.

[REFERENCES ARE TO SECTIONS.]

EMERGENCY—

Carrier may be agent of owner in, 13.

The degree of diligence to be exercised by the carrier when the goods have been overtaken by disaster, 309.

Emergency may justify carrier in deviating from instructions, 612.

In emergency preference must be given preservation of life over preservation of goods, 650.

Extraordinary emergency confers extraordinary power on carrier, 787.

Should sell goods when necessities of case demand, 787.

Carrier compelled by emergency to employ another carrier may increase charge for freight, 822.

Passenger assisting carrier in emergency, 1013.

EMIGRANTS—

Special rates to, 1030, note 19.

EMPLOYEE (See AGENT)—**EMPLOYEE'S PASS—**

When person riding on "employee's pass" is regarded as a passenger, 1004.

EMPTY PACKAGES—

Return of empty packages without further charge, carrier liable for loss, 397, note 16.

ENEMY (see PUBLIC ENEMY)—

Delay through acceptance of enemies' goods, 653, note 22.

ENGINE—

Escape of sparks from, 503.

Delay through insufficiency of engines, 653, note 22.

Liability of passenger carrier for latent defect in, 903-905.

For defect due to fault of manufacturer, 906-909.

Liability of passenger carrier for using engine out of repair, 911.

When operation of passenger train with locomotive in the rear is negligence, 923, note 18.

Passenger carrier liable for injuries from jerks and jars resulting from use of too small an engine, 924.

Conductor cannot authorize ride on engine, 964.

Riding upon engine cab, 1000.

Borrowers of, are not passengers, 999.

Stockman unnecessarily riding on, assumes increased hazards incident to that position, 1204.

[REFERENCES ARE TO SECTIONS.]

ENGINE—con.

Stockman riding on, when conduct will be excused, 1204.

Passenger unnecessarily riding on, although invited by engineer or fireman, chargeable with contributory negligence, 1218.

Fact that conductor has knowledge that passenger is riding on, no excuse, 1218.

Brakeman has no authority to invite one to ride on, 1218, note 16.

Tender of, passenger riding on, chargeable with contributory negligence, 1218.

ENGINEER—

Passenger carrier liable for negligence of engineer in failing to discover animal on track, 923.

Engineer ordinarily has no right by his invitation to create passengership relations, 998, note 47.

Has no implied authority to invite one to ride on engine, 1218.

ENGLISH LAND CARRIER'S ACT—

Nature and effect of, 393-395, 436, 439, 440, 522.

ENGRAVINGS—

Not baggage, 1249.

ENTERING VEHICLE—

Owner of passenger elevator must allow passengers reasonable time to enter or leave car, 101.

Passenger must be allowed reasonable time to enter carrier's vehicle in safety, 1111.

While in motion, contributory negligence, when, 1181, 1182.

Regulation against passengers entering coaches earlier than thirty minutes before starting, 1077, notes 17 and 18.

EQUAL RIGHTS (see COLORED PERSONS)—

ESCAPE—

Of live animals during transportation, liability of carrier for, 333, note 7.

Carrier may stipulate for exemption from liability for loss due to escape of live stock, 419.

ESCAPING PERIL (see PERIL)—

ESTOPPEL—

Bill of lading, as a receipt, not an estoppel to show the truth, 158.

By accepting receipt from carrier, shipper estops himself from saying that a contract has not been made, 409.

If owner deliberately places value on goods at carrier's request,

[REFERENCES ARE TO SECTIONS.]

ESTOPPEL—con.

he will be estopped from afterwards asserting that their value was more, 428.

When sworn return for purpose of taxation no estoppel on question of cost of reproduction, 583.

Carrier not estopped from showing want of title in the bailor, 749.

When conditional vendor is estopped from disputing carrier's lien for freight, 873.

EVAPORATION—

Carrier not liable for evaporation of liquids, 334.

But may be the loser as to the amount of freight he can demand, 813.

EVIDENCE. (SEE BURDEN OF PROOF; PRESUMPTIVE EVIDENCE; RES GESTAE) —

Bailee—

Loss of his own goods with those of another by gratuitous bailee, *prima facie* evidence of due diligence, 28.

Will not exonerate where gross negligence proven, 29, 30.

Statements made by mandatary who has been robbed, immediately after robbery, competent in his favor, 33.

Statement of mandatary at time of demand and refusal, competent as part of *res gestae*, 33.

Character of mandatary for prudence may be shown in defense, in action for loss of goods, 33.

Bill of Lading—

Copy delivered to shipper best evidence, 155.

As receipt, only *prima facie* evidence, 158.

Very high evidence of quality and condition of goods, not estoppel, 158.

Parol evidence admissible to contradict, vary or explain bill of lading as a receipt, 158.

Recital in bill of lading that goods are in good order refers to external appearance, 163.

Parol evidence inadmissible to vary terms of contract contained in bill of lading, 167.

But ambiguity may be removed by parol evidence, 167.

Implied obligations cannot be varied by parol, 168, 169.

Parol evidence is admissible to prove terms of subsequent parol agreement which changes or modifies terms of written contract, 170.

Bill of lading sole evidence of final agreement where delivered

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—*Bill of lading*—con.

after oral contract of shipment made, but before shipment has begun, 171.

Parol evidence admissible to show actual agreement when goods shipped under parol contract before bill of lading delivered, 172.

Common Carrier—

Where contract for through carriage is express, no resort need be had to circumstantial evidence, 238.

What facts constitute good evidence of a contract for through transportation, 238, 239.

To render carrier liable by act of God, language must be clear, 266, 267.

Shipper accepting bill of lading, conclusive evidence of assent to its terms, 409.

Evidence necessary to prove a contract containing limitations of the carrier's liability, 411.

Unsigned bill of lading may be evidence of the contract actually made, 411, note 3.

Previous parol contract merged in bill of lading, 412.

Not necessary that bill of lading or receipt be signed by both parties, 412.

Signature of carrier to, evidence of receipt of goods and contract to carry, 412.

Terms of limitation and receipt or bill of lading must be plain and easily legible, 415.

Must be written or printed on face, 415.

Printed on back, no evidence in favor of carrier, 415.

When declaration of value conclusive against shipper, 437.

What constitutes a waiver of condition that claim for loss or damage must be presented in a certain time, 444.

Contracts exempting carrier from liability for negligence must be explicit, 463.

Ambiguities in carrier's notice or receipt resolved against him, 464.

Specific exceptions control general terms, 465, 466.

Contract must have a fair construction, 476.

Bill of lading of sea-going vessel silent as to stowage, goods must be stowed under deck, 603, 604.

Parol evidence not admissible to vary, 603.

See COMMON CARRIER; STOWAGE; TRANSPORTATION.

Declaration of duty to carry in a "reasonable" time not sus-

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—*Common carrier*—con.

- tained by proof of a contract to carry in a prescribed time, 625, note 14.
- Evidence admissible as to condition of live stock, 634, note 37.
- What constitutes evidence of insufficient ventilation for live stock, 635.
- When delay in transportation coupled by evidence of its cause may show negligence, 651.
- What evidence will justify delivery by carrier to an agent, 674.
- Cogency of receipt as evidence of address on package, 677.
- Evidence necessary to show delivery by railway companies under Massachusetts rule, 702.
- Evidence necessary to show delivery by railway companies under New Hampshire rule, 704, 705.
- Massachusetts and New Hampshire rules as to delivery do not apply to delivery between connecting carriers, 706.
- Evidence necessary to show delivery by carrier under New York rule, 708.
- Admission of agent as to his lack of authority to stop goods *in transitu* not conclusive, 759.
- What is sufficient evidence of insolvency to justify exercise of right of stoppage *in transitu*, 761.
- Declaration or admissions of insurer immaterial in action against carrier, 784, note 18.
- If right of action be created by foreign law, proof should be made in court of forum of what foreign law is, 207.
- Delivery of goods to carrier must be shown, 1346.
- Necessary, also, to show an undertaking, either express or implied, to transport, 1346.
- Must show, also, a failure to perform contract or duty according to undertaking, 1346.
- But where carrier denies having received goods, non-delivery to consignee need not be proved, 1346, note 1.
- Plaintiff must not leave it doubtful in whose possession goods were at time of default, 1347.
- In absence of through contract or partnership between connecting carriers, proof must show which carrier responsible for loss, 1347.
- Presumption that last of several connecting carriers, who delivers goods in injured condition or deficient in quantity, received goods in same condition as when delivered to first carrier, 1348.

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—*Common carrier*—con.

Mere delivery of goods by final carrier in injured condition or deficient in quantity raises presumption that injury was occasioned by his fault, 1348.

But plaintiff must first show condition or quantity of goods when delivered to first carrier, 1348.

Final carrier may rebut presumption that injury or loss occurred while goods were in his possession by showing that he received them in condition in which he delivered them, 1348.

Fact that goods are concealed in boxes or packages does not relieve final carrier from showing that he received goods in condition in which he delivered them, 1348.

This presumption that final carrier was at fault applies also to intermediate carrier in whose possession goods are found in damaged condition, 1348.

Bill of lading given by first carrier competent evidence, in action against final carrier, to show condition or quantity of goods when delivered for transportation, 1348.

But in action against initial carrier, receipt of connecting carrier not competent evidence, 1348, note 13.

In action against first or any intermediate carrier for injury to goods delivered at destination in damaged condition, plaintiff must show that injury occurred while goods were in defendant's possession, 1348.

But first or any intermediate carrier may be held liable if his negligence has contributed to injury, 1348.

Rule in Michigan, 1349.

Contract with carrier may be either express or implied, 1350.

If contract be express, it must be proven as laid, whether action be in form *ex delicto* or *ex contractu*, 1350.

From necessity of proof of undertaking, although action be in form *ex delicto*, it is sometimes designated as an action *ex delicto quasi ex contractu*, 1350.

Express contract not necessary, 1351.

Undertaking to carry implied from proof of delivery with directions as to carriage, 1351.

No undertaking to carry implied from delivery to mere private carrier, 1351.

Burden of proof on plaintiff to show loss, 1352.

If this out of plaintiff's power, he must prove such circumstances as will create inference of loss, 1352.

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—Common carrier—con.

Proof of delivery of goods to carrier and his failure, after reasonable time, to deliver them to consignee, *prima facie* evidence of liability, 1352.

Proof of delivery of goods to carrier in good order and his delivery of them at destination in damaged condition, *prima facie* evidence of liability, 1352.

Carrier may show limitation of time for commencing suit, 448.

Carrier may show that loss or injury was occasioned by the act of God, 1353.

Or by the public enemy, 1353.

Or by the fraud or fault of the owner of the goods, 1353.

Or that the loss or injury resulted from an inherent defect or infirmity in the goods themselves, 1353.

Or that by his contract he is excused, 1353.

In such cases, burden of proof on carrier to bring his case within exception, 1353.

Rule that burden of proof is upon carrier, after bringing his case within exception, to show that he was not negligent, 1354.

States following this rule, 1354.

Rule that burden of proof, after carrier has brought his case within exception, is upon shipper to show that carrier was negligent, 1355.

States following this rule, 1355.

Importance of question, 1356.

Burden of proof where property injured consists of live stock, 1357.

Where live stock is under carrier's exclusive control, delivery at destination in injured condition will be *prima facie* evidence of liability, 1357.

But if live stock was under control of shipper, he must show not only that he himself was free from negligence, but that carrier was at fault, 1357.

Interstate Commerce Act—

A comparison of rates of small importance in determining the reasonableness of a particular rate, 533.

But may be important under sections two and three of Interstate Commerce Act, 549, 552.

Evidence as to discrimination in coal car distribution under section three, 557.

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—con.

Passenger carrier—

Question of negligence of passenger carrier usually one of fact, 1411.

Burden of proof on plaintiff to prove negligence, 1411.

When negligence of carrier will be presumed, 1412, 1413, 1414, 1415.

Mere proof of accident, without more, not sufficient to raise presumption of negligence, 1412.

Circumstances attending accident must be shown, 1412.

If accident connected with means or instrumentalities of transportation, a *prima facie* presumption of negligence will arise, 1413.

This a just rule, 1413.

Negligence presumed where injury caused by breaking down or overturning of vehicle, 1414.

Or by derailment of train or of cars, 1414.

Or by collision between trains, 1414.

Or by an unusual jerk or jolt, 1414.

Or by parting of train, 1414.

Or by breaking down of bridge, 1414.

Or by falling of appliances within vehicle, 1414.

Or by obstruction placed by carrier too near track, 1414.

Or by spark from locomotive, 1414.

Or by block of coal thrown from engine, 1414.

Or by explosion of locomotive boiler, 1414.

Or by fall of gangway when carriage is by water, 1414.

Or by bursting of a steam drum, 1414.

Or by failure of boat's machinery to operate, 1414.

Or by breaking of machinery, 1414.

Or by collision of boat with bank, 1414.

Or by overturning of stage-coach, 1414.

Or by horses attached thereto running away, 1414.

Or by breaking of axletree of coach, 1414, note 20.

But where injury is received by passenger while about carrier's premises, no presumption of negligence will arise, 1414.

No presumption of negligence will arise where accident causing injury to passenger is to him and not to vehicle, 1414.

Or where injury is caused by passenger stepping on object on station platform when alighting, 1414.

[REFERENCES ARE TO SECTIONS.]

EVIDENCE—*Passenger carrier*—con.

Or where injury is caused by rock becoming detached from adjoining hillside and striking train, 1414.

Proof of injury usually makes *prima facie* case of negligence, 1415.

Carrier, to rebut presumption of negligence, must show that accident was inevitable, or that same could not have been avoided by exercise of utmost care and foresight, 1415.

But where plaintiff proceeds to show just how accident happened, instead of resting on facts which would establish a *prima facie* case against carrier, his testimony must prove that accident was due to negligence, 1415.

Georgia, presumption of negligence under statute of, 1413, note 51.

Nebraska, under statute of, carrier liable for any injury to passenger while being transported, unless same caused by criminal negligence of passenger or by his violation of some express rule of carrier actually brought to his notice, 1413, note 52.

Presumption of negligence held not to arise where passenger has assumed risk of all injury, 1416.

Contributory negligence of passenger, burden of proof on carrier to show, 1417.

States following this doctrine, 1417.

But where plaintiff's own evidence shows him to have been guilty of contributory negligence, rule does not apply, 1417.

Cases holding that burden of proof is on plaintiff to show he was free from negligence, 1418.

To defeat recovery, plaintiff's negligence must have been proximate cause of injury, 1419.

How question of contributory negligence determined, 1420.

Where facts are in dispute or are such that reasonable minds may fairly draw different conclusions as to plaintiff's conduct, question of his negligence is for jury, 1420.

But where facts are not in dispute, and are such that all reasonable minds must concede that plaintiff was guilty of negligence, question of carrier's liability may be decided as one of law, 1420.

EXAMINATION—

Duty of carrier as to examination of vehicles to discover latent defects, 903-905.

[REFERENCES ARE TO SECTIONS.]

EXAMINATION—con.

To discover defects attributable to fault of manufacturer, 906-909.

Duty of carrier as to examination of bridges, 910.

Examination should be made of vehicle immediately previous to each journey, 956.

Rule even more stringent as to steamboats and railways, 957.

Cursory inspection of conductor or brakeman need not be as exhaustive as a regular inspection while the train is at rest, 957.

Such inspection cannot be continuous, 957.

Railroad company not therefore liable for accidental locking of door of water-closet on female passenger, 957.

Or until it has had an opportunity to remove it for accumulations of snow or ice, vomit or mud on steps or platform of car while en route, 957.

Vessel not liable for failure to keep floor constantly dry around water cooler in steerage of vessel, 957, note 14.

Nor for injuries to passenger due to falling over socket for table in dining saloon, when passenger is cognizant of its presence, 957, note 14.

Liability for ice on deck of ferry-boat, 957, note 14.

No legal duty on railroad company to remove ice from railing or platform of express car, 957, note 18.

Railroad company not liable for persistence of passenger in getting off at end of car where there is snow and ice, when conductor is assisting passengers in alighting at other end, 957, note 18.

Inspection required while cars are at rest is much stricter than when in motion, 957.

This vigilance extends to sleeping cars owned by another company, but used by its passengers, 957.

Liability for snow and ice on car steps before car starts, 957, note 21.

EXCAVATION—

Accidents due to excavation in right of way, 948, note 49.

EXCEPTIONS (see **LIMITATION OF LIABILITY BY CONTRACT; LIMITATION OF LIABILITY BY STATUTE; ACT OF GOD; PUBLIC ENEMY; PUBLIC AUTHORITY; INTERMEDDLING; FRAUD; SHIPPER; LIVE ANIMALS; STATUTES; HARTER ACT; INHERENT NATURE**).

EXCESSIVE CHARGES (see **OVERCHARGES**)—

To shippers discriminated against may be recovered back, 521, 537, 574.

[REFERENCES ARE TO SECTIONS.]

EXCESSIVE CHARGES—con.

- Exorbitant rates not permissible in order to pay dividends, 581.
- Rights of shipper when excessive rates demanded, 805.
- Rights of consignee when excessive demurrage demanded, 855.
- Pleadings in action to recover back, 1341-1343.

EXCHANGE—

- Of tickets, effect on stipulations therein, 1031.

EXCURSIONIST—

- Is entitled to protection as passenger, 1017.

EXCURSIONS—

- Railroad liable where large excursion crowd attracted, and by using only one of five possible gates at station, passenger is injured, 929, note 14.
- One accepted by conductor on special excursion train is passenger, 998, note 47.
- Excursion tickets not good on general train, 1058.

EXCUSE—

- Excuses of carrier for refusing to accept goods for carriage, 145-148.
- Act of God as an excuse for non-delivery, 265, *et seq.*
- Act of public enemy as an excuse for non-delivery, 314, *et seq.*
- Acts of the public authority as an excuse for non-delivery, 324, *et seq.*
- Act of owner as an excuse for non-delivery, 333.
- Inherent defect in goods as an excuse for non-delivery, 334.
- Failure to pay expenses no excuse to carrier for unjust discrimination, 550.
- Excuses for failure to deliver goods in prescribed time, 625-628.
- Carrier not excused by circumstances beyond his control where time is prescribed, 627.
- Failure of the shipper to furnish caretaker does not excuse any subsequent negligence on the part of the carrier, 642.
- Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock, 644.
- Excuses for delay in transportation, 654.
- Carrier excused for non-delivery when goods taken from him by legal process, 738-740.
- Even when seized under process against stranger, 739, 740.
- When seized under process against stranger, no protection to carrier in Massachusetts, 741.

[REFERENCES ARE TO SECTIONS.]

EXCUSE—con.

Process to protect must be at least fair upon its face, 742.

Carrier must give prompt notice to consignor or owner of proceedings against goods, 743.

Carrier by water must defend suit till owner notified, 744.

Seizure must not have been brought about by laches or connivance of carrier, 745.

Effect of garnishment or trustee process, 746-748.

When adverse claim set up to property, 749-756.

Non-delivery through commendable motives of carrier no excuse, 756.

Stoppage *in transitu*, 757-775.

Excuses for detention of carrier's vehicles, see DEMURRAGE.

EXECUTORS AND ADMINISTRATORS—

Right to sue for personal injuries did not survive to, at common law, 1376, *et seq.*

See LORD CAMPBELL'S ACT.

By statute, in many states, actions founded in tort will survive to personal representative, 1330.

In actions for death by wrongful act, right of action usually given to personal representatives, 1389.

Form of action when action for death by wrongful act brought by personal representative, 1405.

EXEMPLARY DAMAGES (see PUNITORY DAMAGES)—

EXEMPTION (see LIMITATION OF LIABILITY BY CONTRACT; LIMITATION OF LIABILITY BY STATUTE; ACT OF GOD; PUBLIC ENEMY; PUBLIC AUTHORITY; INHERENT NATURE; INTERMEDDLING; FRAUD; SHIPPER; LIVE ANIMALS; STATUTES; HARTER ACT)—

Exemption clauses in bills of lading strictly construed, 365.

EXITS (see APPROACHES TO AND EXITS FROM STATIONS AND PLATFORMS)—

EXPENSES—

Failure to pay expenses no excuse for unjust discrimination, 550.

EXPLOSION—

Not an act of God, 281.

Inrush of water through explosion of blasting cap not a peril of the sea, 488.

Explosion of boiler not a peril of the sea, 489.

Carrier as warehouseman not liable for explosion of dangerous goods of the character of which he was not aware, 685.

[REFERENCES ARE TO SECTIONS.]

EXPLOSION—con.

Liability of passenger carrier for explosion of gas tank, 919.

Explosion of heating apparatus in hotel where ticket office maintained, 940.

Of locomotive boiler, *prima facie* case of negligence, 1414.

EXPOSED POSITION—

Passenger voluntarily occupying, upon vehicle, chargeable with contributory negligence, 1194.

Passenger voluntarily sitting beside open window through which sparks are entering, chargeable with contributory negligence, 1194.

But not, where danger not reasonably to be anticipated, 1194, note 23.

Passenger voluntarily riding on top of caboose, chargeable with contributory negligence, 1194.

Passenger voluntarily swinging body beyond outer surface of moving car, chargeable with contributory negligence, 1194.

Effect of carrier's acquiescence or directions, 1195.

Where passenger invited or directed by servant, acting in line of duty, to occupy exposed position on vehicle, he will not be chargeable with contributory negligence unless danger obvious, 1195.

Platform of car, riding on, by invitation of carrier's servants, not negligence, 1195.

Hurricane deck of vessel, going upon by direction of officer, not negligence, 1195.

Caboose, riding upon top of, by order of conductor, not negligence, 1195.

Occupying exposed position, no bar to recovery where it does not contribute to injury, 1196.

Occupying exposed position, no bar to recovery if accident which occasioned injury would have been attended with same result, no matter upon what part of vehicle passenger was, 1196.

Passenger voluntarily and without necessity standing on platform of car while train in motion, chargeable with contributory negligence, 1197.

Passenger standing on platform of car while train in motion, after request by conductor to go inside, chargeable with contributory negligence, 1197, note 34.

Passenger standing on platform of car while train in motion, in violation of company's rules, which are known to him, charge-

[REFERENCES ARE TO SECTIONS.]

EXPOSED POSITION—con.

- able with contributory negligence, 1197, note 34.
- Interurban car, passenger voluntarily standing on platform of, while in motion, chargeable with contributory negligence, 1197, note 34.
- Modern improvements have largely modified risk of standing on platform while car in motion, 1197, note 35.
- Standing on platform while car in motion, no bar to recovery where it does not contribute to injury, 1197.
- Standing on platform while car in motion, not contributory negligence where passenger is invited or directed by company's servants to do so, 1197.
- But where danger is obvious, invitation or direction by company's servants, no excuse, 1197.
- Where passenger is invited or directed by company's servants to stand on platform of moving car, question of passenger's negligence is for jury, 1197.
- Standing on platform while car in motion, not necessarily contributory negligence where passenger is induced to do so by conduct of carrier's servants, 1197.
- Under such circumstances, question whether passenger was negligent, one of fact for jury, 1197.
- Standing on platform while car in motion, whether contributory negligence, held, question for jury, 1197, note 37.
- Standing on platform of moving car when car full, not contributory negligence as a matter of law, 1198.
- But passenger must exercise for his safety, when so obliged to ride upon platform, a degree of care commensurate with the danger, 1198.
- Notice forbidding passengers to ride on car platform, deemed waived when passengers received, and there is not sufficient room inside, 1198, note 39.
- Seat, passenger unable to obtain, within car, cases holding he will be justified in riding on platform, 1198.
- Better rule is that if there is standing room within car, passenger should avail himself of it, 1198.
- But passenger not required to disregard usual courtesies of life in order to secure place within car, 1198.
- Standing on platform of moving car, not contributory negligence where passenger justified in believing he cannot get inside without unreasonably pushing and crowding his way, 1198.

[REFERENCES ARE TO SECTIONS.]

EXPOSED POSITION—con.

- Direction by conductor to go within car should be obeyed, 1198, note 42.
- Passenger made sick by conditions within car, not negligence for him to go upon platform, 1198, note 42, 1199.
- Standing on platform of moving car in order to better escape impending danger, not negligence as a matter of law, 1199.
- Injury to passenger from beam while boat discharging lumber, passenger having voluntarily left a place of safety, 890, note 1.
- Accepting passage over new road not yet open for traffic, 900, note 25.
- Occupying exposed position upon railway company's premises, contributory negligence, 1208.

EXPOSURE OF ANIMALS—

- Carrier liable for injuries to animals due to negligent exposure to cold, 342, note 1.

EXPOSURE OF GOODS—

- Carrier liable if he negligently exposes goods to danger, notwithstanding loss occurs through act of God, 292.
- Or through excepted cause, 420.
- Use of exposed cars, 504.
- Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.
- Carrier by water not discharged from responsibility by landing at exposed place without protection and notifying consignee, 688.

EXPRESS CARS—

- In absence of custom, carrier need not provide entrance to its train by express car, 927.
- Bundles thrown from, and injuring passenger, 1011, note 3.

EXPRESS COMPANIES—

- Always common carriers, 80.
- Strictly responsible for subsidiary means of transportation, 82.
- Cannot escape liability by assuming name of forwarder, 83.
- In absence of custom, need accept goods only at regular places of business or on lines of travel, 123.
- Whether railroad companies are bound to furnish facilities to express companies without discrimination, 514.
- Authorities in conflict on this question, 514-516.
- The "Express Cases" in the United States Supreme Court, 517.

[REFERENCES ARE TO SECTIONS.]

EXPRESS COMPANIES—con.

- Right of one express company to use the facilities of another express company, 518.
- Are subject to Interstate Commerce Act, section one of act, 523.
- Duty to feed and water cattle, 638, note 49.
- Delivery by express companies to wrong person, 668, *et seq.*
- Express company liable for negligence in delivery although holding goods merely as warehouseman, 681, note 47.
- Express companies required to make personal delivery, 716.
- Personal delivery excused at small stations, 717.
- Company may establish limits in a city beyond which it will not go to make delivery, 717.
- How far usage may affect duty to make personal delivery, 718, 719.
- Express company may demand payment of charges in advance, 799, note 12.

EXPRESS MESSENGERS—

- Coming to station before train leaves, 936, note 12.
- Duty of carrier toward express messengers, 1018.
- But contract that express messengers shall assume risk of all accidents or injuries in course of employment not against public policy, 1018, 1073.
- Conflict of authority on question whether express messenger is chargeable with notice of terms of contract of express company and railroad company, 1018.
- Regulation against passenger acting as express messenger, 1077, note 17.

EXPRESS WAGONS—

- Proprietors of, when common carriers, 68, 70.

EXTRATERRITORIAL EFFECT—

- Of statute giving action for causing death, 1387.

FACTORS—

- When liable for freight, 809, *et seq.*

FALSE ARREST (see ARREST)—

- By carrier's servants, damages for mental distress occasioned by, may be recovered, 1427.

FAMILY PORTRAIT—

- Measure of damages in case of loss, 1363.

FARE (see TENDER)—

- Amount that may be charged, 1023.

[REFERENCES ARE TO SECTIONS.]

FARE—con.

Statutes regulating, 1023.

Discriminations in, 1023.

Constitutionality of statutes requiring issuance of free transportation, 1023, note 2.

Carriers cannot collect more than legal fare, 1023.

How paid, 1024.

Carrier may require prepayment, 1024.

Passenger entitled to reasonable opportunity to pay, 1024.

Not bound to tender exact sum to carrier, who must furnish change to a reasonable amount, 1024.

Tender of coin worn smooth by use, 1024, note 11.

Tender of torn bills, 1024, note 11.

Carrier not obliged to accept passenger's jewelry as a pledge, 1024, note 11.

Who liable for fare, 1025.

Person traveling with child in his custody liable for payment of child's fare, 1025.

If carrier wrongfully ejects child, parent may get off also and recover for wrongful expulsion of both, 1025.

When brother or sister liable for payment of fare of other, 1025, note 12.

Paying in counterfeit money, 1026.

Effect of statutory requirement that conductor wear badge to show his authority to collect fares, 1027.

Passenger need only allege that he was ready to pay such a sum of money as carrier was legally entitled to charge, 1019.

Person accepted for carriage without payment or expectation of payment of fare as a passenger, 1020.

Children carried free are passengers, 1020.

But carrier must have knowledge that person or child is being carried free, 1020.

Infant cannot maintain action against carrier for injuries received before birth, 1020.

Same care and diligence due to gratuitous passengers as to others, 1021.

Carrier may charge such rate of, as will compensate him for responsibility assumed for safety of baggage, 1241, note 3.

Carrier has no right to detain passenger to compel payment of, 1302.

May refuse to accept person who refuses to pay fare, 966.

Prepayment not always necessary, 1008, 1019.

[REFERENCES ARE TO SECTIONS.]

FARMER—

As common carrier, 54.

FAST FREIGHT LINE—

Common carrier cannot escape liability by assuming name of "fast freight line," 84.

FATHER (see PARENT)—

Ejection of, with adult son, 976.

Traveling with infant child, may recover in *assumpsit* for loss of articles purchased for use by child, 1277.

May recover for mental suffering occasioned by unreasonable delay in shipment of body of his deceased son, 1375.

FEATHER BED—

When not baggage, 1249.

FEED AND WATER—

In absence of special contract, carrier bound to feed and water animals, 634, note 37.

Carrier must provide suitable places for feeding and watering live stock, 638.

Shipper may contract to feed and water live stock while in transit, 640.

But he must be given reasonable opportunity and facilities for performing his contract, 641.

FELLOW-PASSENGER—

Carrier not liable where fellow-passenger allows window to suddenly fall on passenger's hand, 900, note 25.

Carrier not liable for injuries due to stampede of other passengers, 900.

Nor for injuries due to passengers all rushing to one side of boat, 901.

Liability of carrier for injury caused passenger by articles brought into vehicle by another passenger, 920, 921.

Passenger carrier not liable for injuries from jar caused by fellow-passenger inadvertently setting emergency brake, 924, note 27.

Carrier may refuse to accept as a passenger one likely to become a burden on fellow-passengers, 966.

Assaults by fellow-passengers, 980, *et seq.*

Injury to passenger while helping conductor to care for sick fellow-passenger, 1013.

[REFERENCES ARE TO SECTIONS.]

FELONIOUS ACT—

Under English Land Carrier's Act, carrier would not protect himself by notice against loss caused by the felonious acts of his servants, 395, 436.

Same under Railway and Canal Traffic Act, 396.

Carrier cannot stipulate against felony of himself or his servants, 418.

FEMALE PASSENGERS—

Injuries to, through their mode of dress, 911, note 23.

Not required to let themselves down backwards from car, 933, note 27.

Failure to light station not proximate cause of assault on, 936.

Accidental locking of door of water-closet on, 957.

Protection of female passengers against wanton approach or insults, 982.

Ejection of female passenger, 1083.

Indecent assaults on, by carrier's servants, 1101.

Protection due to, 1101.

Duty to assist female passengers in alighting, 1127.

In enfeebled condition, attempting to alight from moving car, chargeable with contributory negligence, 1180, note 10.

Weighing 200 pounds, attempting to alight from moving train, chargeable with contributory negligence, 1180, note 10.

Duty of master of vessel towards, 1162.

FENCES—

Duty of railroad company to maintain fences along right of way to keep animals off track, 955.

FERMENTATION—

Carrier not liable for bursting of vessels owing to fermentation of contents, 334.

FERRY—

Where stage owner uses ferry, liable for negligence of ferry company, 916.

Duty as to stational facilities and mooring boat, 942, notes 6, 9, 13.

FERRY-BOAT—

Carrier liable for negligent collision of ferry-boat with dock, 923.

FERRY-MAN—

Is common carrier, 66, 128.

Whether ferry-man is common carrier of goods retained in the custody of the passenger, 67.

[REFERENCES ARE TO SECTIONS.]

FERRY-MAN—con.

- May show he is mere private carrier for hire, 89.
- When delivery to ferry-man complete, 128.
- All ferry-men need not use same safety appliances, 953.

FILBERTS—

- Injury to, from coal dust, 609.

FINGERS—

- Injury to passenger's fingers by sudden closing of door or window on carrier's vehicle, 927, notes 3 and 5.

FIRE—

- Private carrier or ordinary bailee not responsible for accidental destruction of goods by fire, 4.
- Common carrier liable for loss of goods by fire, even though unavoidable, 4, 54, note 10.
- Loss of cotton by fire due to sparks from carrier's engines, 115, note 33.
- Destruction of baggage by fire after delivery to carrier, 116.
- Destruction of goods by fire while still in hands of initial carrier, 130, 131, 132, 135.
- Whether act of God, 279, 280.
- Carrier may stipulate for exemption in case of loss by fire, 420.
- Limitation of liability for loss by fire strictly construed, 464, 465.
- Limitation enures to benefit of connecting carriers, 470, 471.
- Carrier liable notwithstanding exemption if the loss be the result of his negligence, 479.
- Losses by fire not within exception of perils of the sea, even where motive power furnished by fire, 489.
- When failure to provide fire extinguishers is negligence, 504.
- When loss by fire, preference must be given preservation of life over preservation of goods, 650.
- Destruction of part of road or city by fire as excuse for delay in transportation, 654.
- Carrier as warehouseman not liable for loss by accidental fire, 685.
- Loss of cotton by fire after notice of arrival sent by carrier by water to consignee, 694, note 24.
- Destruction of goods by fire after consignee has had reasonable time to remove them, 713.
- In country village same degree of security as to fire as in larger

[REFERENCES ARE TO SECTIONS.]

FIRE—con.

cities cannot be required of carrier while acting as warehouseman, 717, note 12.

Carrier not liable for loss by fire while goods are in possession of custom house officials, 755.

Insurance against loss by fire, 783, 784.

When fire must be provided in waiting-rooms, 931.

FIRE-ARMS—

Common carrier cannot constitute himself judge as to what use fire-arms will be put, 756.

When passenger carrier liable for injuries from use of fire-arms by person near track, 913, note 32.

Carrier bound to exercise utmost vigilance in guarding against careless use of fire-arms, 985.

Liability of carrier for accidental discharge of musket by disorderly soldier, 985.

Liability of carrier where conductor retreats from scene of difficulty and passenger is shot by one of a disorderly crowd of men on train, 985.

But duty of carrier is fulfilled when he has exercised the force at his command to prevent injury, 985.

Passenger shot while alighting, 989, note 18.

FIRE EXTINGUISHERS—

When failure to provide fire extinguishers is negligence, 504.

When not negligence, 510, note 51.

FIREMAN—

Has no implied authority to invite one to ride on engine, 1218.

FIREWORKS—

Injury to passenger by fireworks brought into car by another passenger, 921, note 9.

FISH—

Seizure of, by game warden, 742, note 22.

FISHING APPARATUS—

When baggage, 1244, 1254.

FLAG STATIONS—

Railroads may be relieved from furnishing depots or platforms at, 929.

Passenger going to flag station at night, and becoming sick through exposure, 929.

Person who gives proper signal at flag station, in attempting

[REFERENCES ARE TO SECTIONS.]

FLAG STATIONS—con.

- to board train when it has stopped, is a passenger, 1005, note 35.
- Buying tickets to, 1060, note 7.
- Duty of carrier to stop at, 1110.
- Duty of passenger to notify conductor of destination, 1126.

FLOODS—

- Whether loss by floods is act of God, 271, 292.
- Whether carrier is liable for loss by act of God which would not have occurred but for his unreasonable delay, 298, 299, 302, 303, 305.
- Washouts caused by unprecedented floods as an excuse for delay, 654.
- Carrier holding as warehouseman not liable for loss from extraordinary floods, 714, note 4.
- Charterer may guard against liability for delay by floods in charter party, 841.
- Passenger carrier not required to provide against unprecedented floods, which cannot reasonably be foreseen, 948.

FLOUR—

- Improper stowage of, near kerosene 606, note 30.

FLYING SWITCH—

- Carrier liable for injury to live stock through making a, 639.
- Passenger carrier liable for making a, 924.

FOG—

- When loss through fog is a peril of the sea, 484, 486.

FOG HORNS—

- Failure to have fog horn in good condition may show lack of due diligence on part of shipowner, 377.

FOOD—

- Must be furnished on ship, 1156.

FOOTPADS—

- Robbery of passenger by, when carried past station, 1126, note 3.

FORGERY—

- Effect of delivery on forged order, 674.
- While carrier is holding as warehouseman, 683.

FORMS OF ACTION—

In actions against common carriers—

- In actions against carriers of goods, same law governs whether the form of action is *assumpsit* or tort, 204.
- Form of action of less importance than formerly, 1321.

[REFERENCES ARE TO SECTIONS.]

FORMS OF ACTION—*In actions against common carriers—con.*

Until recent times, actions against carriers were *ex delicto*, 1322.

Obligations growing out of contract were therefore never associated with question of carrier's liability, 1322.

First recognition of theory of carrier's contract obligation, 1323.

Both *assumpsit* and case now resorted to, 1324.

When action in tort is preferable, 1324.

Where doubt as to who should be made defendants, action upon the case is preferable, 1324.

When action upon the case is resorted to, recovery against a part of those sued can be maintained, 1324, 1325.

Action upon the case is more proper form of action, 1324, note 3.

Action in case is several and not joint, 1325.

Plaintiff may elect to sue one or all in tort, 1325.

Carrier in partnership sued singly in an action *ex delicto* cannot plead non-joinder of others either in abatement or in bar of action, 1325.

Advantages of declaring in case, 1326.

Not necessary to state circumstances with as much certainty as is required in actions of *assumpsit*, 1326.

In action upon the case, count in trover may be included, 1326.

Advantages of declaring in *assumpsit*, 1327.

In *assumpsit*, plaintiff may join common counts with other counts to which common counts are applicable, 1327.

Action in *assumpsit* will survive to personal representative of plaintiff, 1327.

Will survive also to personal representative of defendant, 1327.

In *assumpsit*, if any parties who are liable are omitted, it will be ground for plea in abatement, 1327.

In *assumpsit*, count in trover cannot be joined, 1327.

Distinctive character of declaration, 1328, 1329.

Difficulty of distinguishing between actions on the case and in *assumpsit*, 1328.

Mere allegation of promise in declaration not sufficient to make it one upon contract, 1328.

But averment of promise and a consideration will be construed as making declaration one upon contract, 1328.

[REFERENCES ARE TO SECTIONS.]

FORMS OF ACTION—*In actions against common carriers—con.*

If language of petition is equivocal, it will be construed as one in tort, 1328, note 13.

Distinction in form of action now generally unimportant, 1330.

By statute, in many states, recovery may be had against part of defendants, although action be upon contract, 1330.

By statute, in many states, actions founded in tort will survive to personal representative, 1330.

When action should be upon the contract, 1331.

Action should be upon contract where contract imposes greater duty than that imposed by law, 1331.

In Indiana, if action is founded on tort and proof shows a special contract, variance will be fatal, 1331, note 15.

When action should be for breach of duty, 1332.

Action should be for breach of duty where contract contains terms limiting carrier's common law liability, 1332.

Action for loss of baggage carried gratuitously must be in tort, 1332.

Case and not *assumpsit* is appropriate form of action where goods damaged while in carrier's freight house, 1332, note 18.

In actions against passenger carriers—

Action for injury to passenger may be in *assumpsit* or tort, 1403.

Form of action when exemplary damages are claimed, 1404.

When exemplary damages are claimed, action must be in tort and not in *assumpsit*, 1404.

Form of action when brought by personal representative, 1405.

When action brought by personal representative, it must appear that deceased party has suffered some pecuniary loss which impaired value of his estate, 1405.

Where action brought by personal representative, damages for personal pain and suffering of deceased not recoverable, 1405.

Contrary rule in Tennessee, 1405.

Recovery must be for cause of action stated, 1406.

Proof must follow allegations, 1406.

Where plaintiff pleads specially the facts upon which he relies, he must confine his proof to those facts, 1406.

How form of action determined, 1407.

Allegation in declaration of contract or undertaking does not

[REFERENCES ARE TO SECTIONS.]

FORMS OF ACTION—*In actions against passenger carriers*—con. necessarily determine that action is not for breach of duty, 1407.

Contract often stated by way of inducement, 1407.

Although *assumpsit* maintainable, more appropriate form of action is in case, 1408.

FORWARD—

Meaning of the term “to forward” or “to be forwarded,” 244, 245, 246.

FORWARDERS (See **CONNECTING CARRIERS**)—

Express companies cannot escape responsibility by assuming name of “forwarders,” 83.

FOURTH OF JULY—

Delivery of goods upon, 693.

Usage of railroad company not to give notice to consignee of arrival of goods on Fourth of July valid, 710.

FRAUD—

Carrier always liable for losses occasioned by his fraud, 14.

Private carrier for hire cannot stipulate against losses occasioned by his fraud, 40.

When indorsement and delivery of bill of lading procured by fraud, no title passes even to *bona fide* holder, 175.

Possession of indorsed duplicate bill of lading obtained by fraud, 189.

Where owner of goods fraudulently misrepresents their character, carrier not liable for loss, 328, 329.

What amounts to such fraud, 330, 331, 332.

Failure to read a contract containing limitations of liability no defense if no fraud practiced, 408.

Carrier cannot stipulate against fraud of himself or his servants, 418.

Fraud will not excuse delivery by common carrier to wrong person, 668.

But will excuse wrongful delivery when carrier is holding as warehouseman, 681.

When C. O. D. goods obtained through fraud may be recovered, 730.

Carrier may return money to consignee when consignor has attempted to practice a fraud upon him, 733.

Seizure of goods under legal process to be an excuse for non-

[REFERENCES ARE TO SECTIONS.]

FRAUD—con.

delivery must not have been brought about by fraud of carrier, 745.

Rights of carrier where low rate has been procured by fraud, 806.

When delivery procured by fraud of consignee, lien for freight not discharged, 871.

Person upon conveyance by fraud, or against express orders of carrier, not a passenger, 1001.

Person fraudulently evading payment of fare not a passenger, 1001.

FREE PASSES (See GRATUITOUS CARRIAGE OF PASSENGERS; GRATUITOUS PASSENGER; PASS)—

Forbidden in section one of Interstate Commerce Act except in certain cases, 523.

Pass issued as favor is unjust discrimination under Interstate Commerce Act, 541.

Free passes discriminative under state statutes, 591.

Persons riding on free pass in North Carolina cannot recover for personal injuries, 591.

Rule where free passes are issued on condition of no liability, 1075.

By statute in some states, passenger can recover for carrier's negligence, even though riding on free pass conditioned against liability, 1075.

In majority of states, carrier can contract against liability for negligence on free pass, 1075.

Immaterial whether person reads conditions on pass or not, 1075.

Rule in case of infants riding on free pass, 1075.

Stipulations against liability for negligence on free pass must be express, 1075.

FREEZING (See COLD; FROST; WEATHER)—

Of canals or rivers, whether act of God, 273, 304.

When it will excuse carrier's delay, 654.

When vessel frozen in, charterer's liability for demurrage, 852.

FREIGHT—

Carrying gratuitously, mere mandatory, 44.

Right to demand, necessary to constitute one a common carrier, 61.

Carrier may demand prepayment of freight, 150.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—con.

Through rate as evidence of contract for through transportation, 239.

Carrier need not advance money to all other carriers on same terms, nor give credit to all other carriers because he gives credit to others, 519.

Requiring prepayment of freight by connecting carrier is not unjust discrimination under Interstate Commerce Act, 567.

Right of carrier to full freight when owner of goods changes their destination, 660.

Or when owner has terminated carriage short of destination, 661.

Effect of usage on such right to full freight, 661.

Consignor must pay carrier's freight on exercise of right of stoppage *in transitu*, 772, note 38.

Carrier may demand compensation in advance, and as condition of acceptance of goods, 799.

Or after the performance of services, 799.

Consignor and consignee accepting goods, both liable for freight, 799.

Party liable for freight may set off damages, 799.

But in England carrier may collect full freight, and owner must resort to separate action, 799.

Carrier entitled to freight only for goods actually delivered, 800.

Unless there be clear intent that he be paid lump sum as freight, 800.

Carrier not entitled to freight if he abandons the goods, 800.

Or if he converts the goods, 800.

Or negligently fails to deliver the goods and reships them to consignor, 800.

Carrier entitled to full freight if prevented by owner from completing journey, 801.

Interruption or delay of journey, while carrier is not at fault, caused by act of God, inclemency of weather, etc., does not justify carrier in terminating it, 801.

Entitled to freight, though goods injured without his fault, 802, 803.

Entitled to full freight when owner elects to receive goods at intermediate place, 802.

Amount of compensation may be fixed by statute, 804.

Or by agreement of parties, 804.

Or by usage, 804.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—con.

In absence of these, carrier will be entitled to reasonable compensation, 804.

Offer to carry freight for a certain rate may be withdrawn before acceptance, 804, note 30.

Inability to get cars before increased rate becomes operative through no fault of carrier does not relieve shipper from reasonable increase, 804, note 30.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Owner may tender reasonable amount, and bring action against carrier refusing to accept goods, 805.

Consignee may tender reasonable amount and, if refused, bring action for goods, 805.

Or may pay charges and sue for excess over reasonable compensation, 805.

Actual tender in such case not necessary, 805.

Mere intent to collect exorbitant charges not a conversion, 805, note 34.

When freight charges are not voluntarily paid, 805, note 34.

Rights of carrier where low rate has been procured by fraud or mistake, 806.

Consignee presumptively owner and *prima facie* liable for freight, 807.

Consignee accepting goods, promise to pay freight implied, 807.

Consignee not owner not liable for freight unless he accepts goods, 807.

Contract to pay may be implied from previous course of dealing, 807.

Consignee's knowledge that carrier is giving up lien on goods for stated amount does not create obligation to pay charges beyond amount stated, 807.

Consignee indorsing bill of lading not liable for freight unless indorsee his agent, 808.

New implied contract as to freight when carrier delivers to assignee of bill of lading, 808.

Presumption as to consignee's liability may be rebutted, 809.

No implication of contract of consignee to pay freight when known not to be the owner, 809.

Consignee for care merely agent; no title vests in, 809.

Intermediate consignee not liable for freight, when, 809.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—con.

Remedy against consignee not exclusive, 810.

Consignee deemed agent of shipper, and latter also liable, 810.

But carrier may treat consignee, as the one liable, and thereby discharge consignor's liability, 810, note 53.

Carrier taking note or acceptance of consignee for freight discharges consignor, 810.

Taking check of consignee dishonored without laches of carrier does not discharge consignor, 810. *

Consignee acting as agent liable for freight unless agency known to carrier, 811.

Amount of freight estimated by measurement at time of shipment, not delivery, 812.

Calculated on quantity shipped, carried and delivered, 813.

Carrier cannot be gainer by an increase of bulk or weight during voyage, 813.

But may be loser by decrease, 813.

Freight pro rata itineris—

Carrier entitled to, when delivery at original destination waived by mutual consent, 814.

Pro rata freight not payable on property destroyed during voyage, 814, note 2.

Acceptance of the goods, or of their proceeds, by owner must have been voluntary to give carrier claim for *pro rata* freight, 815.

Whether acceptance voluntary, how determined, 815, 816.

Carrier refusing to repair ship after disaster, or to procure another vessel, or refusing to prosecute voyage, acceptance of goods by owner no waiver of further carriage, 816.

Acceptance by agent or supercargo or by underwriter equivalent to acceptance by owner, 816.

Carrier failing to show willingness to complete carriage not entitled to freight *pro rata itineris*, 816.

When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.

Sale without authority, carrier not entitled to compensation, 817.

Not entitled to compensation, if sale through unfitness of vessel to carry goods further, 817.

Or under erroneous decree of court, subsequently reversed, 817.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—*Freight pro rata itineris*—con.

Or by person assuming to act for owner, but without authority, 817.

Or where transportation to destination becomes impossible, 818.

Rule otherwise in admiralty when transportation of goods prevented by some incapacity in goods themselves, 818.

Carrier's right to *pro rata* freight when carriage interrupted by war, 819.

Rule for adjusting freight *pro rata itineris*, 820, 821.

Transshipment of goods when vessel delayed, 822.

Carrier compelled by emergency to employ another carrier, may increase charge for freight, 822.

Carrier so employed has lien on goods for freight, 823.

Lien of substituted carrier only co-extensive with that of first carrier, 823, note 22.

But neither the shipper nor goods bound to original carrier for full freight according to original contract, 823.

Rule in such cases, 823, 824.

* Master may act as agent of owner of vessel for making transshipment, 825.

But cannot bind him to pay more freight than was agreed in original contract, 825.

Power to bind owner of goods for increased freight allowed only in case of clear necessity, 825.

When vessel captured by public enemy, carrier loses freight and shipper goods, 826.

• Goods recaptured and carried to destination, carrier entitled to full freight, 826.

When goods carried contrary to wishes of owner—

Owner of goods not party to contract for carriage not liable for freight, 827.

So when goods carried contrary to express orders of owner, he is not liable for freight, 827.

When carrier may sue for freight—

Not till goods delivered, 828.

But such delivery need not necessarily be actual in all cases, 828.

Right to compensation perfect as soon as whole duty of carrier ended, 829.

When connecting carrier pays charges of initial carrier, right of latter assigned to connecting carrier by operation of law, 828.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—con.

When shipper may recover freight paid in advance—

May when goods not delivered, 830.

Local custom to contrary notwithstanding, 830, note 40.

Parol evidence inadmissible to prove contrary, 830, note 40.

Where carrier entitled to apportionment for part performance, can only be compelled to refund part not earned, 830.

Parties may agree that freight may be due before carriage complete, 831.

Effect of payment or non-payment of freight on shipowner's right to demurrage—

Master cannot detain goods on board for non-payment of freight, and charge demurrage, 855.

Collection of freight money not a waiver of claim for demurrage, 857.

Carrier's lien for freight—

Lien for freight and charges, 864.

Lien nothing more than a right to retain possession of goods until carrier's charges have been paid or tendered, 864.

Owner has no right to demand possession of goods until he has paid or tendered payment for carrier's service and advances, 864.

So, in general, carrier has no right to freight until goods tendered to consignee, 864.

Carrier must be in position to demand freight before lien attaches, 864, note 14.

Carriers by water have lien for their charges the same as carriers by land, 864, note 14.

But carrier by water cannot detain goods on board ship where consignee would have no opportunity of examining their condition, 864, note 14.

Rights of respective owners of a ship and cargo are reciprocal, 864, note 14.

Right to a lien for freight gives a right to a lien upon the ship for due performance of contract for safe carriage and delivery, 864, note 14.

Lien attaches to goods for whole freight carrier would earn as soon as they are delivered to carrier, 865, note 15.

Lien of carrier usually a specific one, 865.

Confined to charges and advances upon particular goods upon which it is claimed, 865.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—*Carrier's lien for freight*—con.

No right to retain goods for general balance in absence of contract or usage justifying, 865.

But the rule is otherwise where the same vendor under a single contract of sale, ships several consignments of goods to the same vendee, each shipment embracing several carloads, 865, note 16.

And carriers may by express agreement or long-established usage of particular localities, or of particular classes of those engaged in that business, retain goods for general balances, 865.

Lien extends only to charge as carrier, and not as warehouseman, 866.

Extends to expenses necessarily incurred in reconditioning insufficient bags according to terms of bill of lading, 866, note 18.

But carrier cannot hold goods for debts due himself not connected with the carriage, 866, note 18.

Nor where goods are consigned generally to consignee, for general freight balance against consignor, 866, note 18.

Lien includes legal import duties paid either to government directly or to connecting carrier, 866.

Does not include expenses for warehousing the goods, 866.

Nor to damages arising from a breach of a collateral contract, 866.

In England does not include port charges, 866.

Carrier cannot refuse to deliver until payment of charges for a former shipment is made, 866, note 22.

Lien extends to advances made by preceding carriers, 867.

Final carrier may refuse to deliver until such advances have been paid, unless shown by the bill of lading, or otherwise, to have been prepaid, 867.

Final carrier need not investigate merit of prior charges which are apparently just, 867, note 24.

If charges are apparently regular, right of final carrier not altered by the mistake or omission of a previous independent carrier, 867, note 24.

Effect of shipping goods "released" or prepaid without notice to last carrier, 867, note 24.

Carrier, however, not authorized to pay every extortionate charge that preceding carrier may see fit to impose upon the goods, 867, note 24.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—*Carrier's lien for freight*—con.

Connecting carrier need not delay receiving the goods until original contract with owner can be investigated, 867, note 24.

Connecting carrier not liable to preceding carrier for freight charges if goods are destroyed on wharf preparatory to delivery to him, 867, note 24.

Carrier should examine bill of lading, if one accompanies the goods, to see if freight has been prepaid, 867.

If bill of lading silent, and carrier has no information from other sources, he is justified in advancing freight and will be entitled to lien therefor, 867.

Effect of statement in bill of lading, known to connecting carrier to be erroneous, that freight charges had been prepaid on latter's rights against *bona fide* transferee of bill of lading, 867.

If carrier contracting to carry goods employ another carrier, latter will be entitled to a lien, 867.

Unless first carrier has been paid for the service, 867.

Or unless first carrier had no authority, express or implied, to forward goods beyond his own line, 867.

Lien of last carrier not affected by fact that previous carrier had been in fault by reason of damage to the goods, 867.

Mistakes or errors made by first carrier, or any intermediate carrier, in giving directions for forwarding goods, will not affect final carrier's right of lien, 867, note 31.

If goods carried to wrong destination, or over wrong route, by fault of shipper or his agent, final carrier entitled to his lien, 867.

Rule where initial carrier, without authority, guarantees a lower through rate to the shipper than the regular rate, 867.

In such case, right of final carrier to lien for prior charges, would depend on whether he had actually paid them, 867.

When lien on sub-freight may be exercised by shipowner, 868.

Unconditional delivery by carrier discharges lien, 869.

Fact that consignee is agent of consignor, and agrees to hold goods until charges are paid, does not alter rule, 869.

Carrier may deliver, and reserve right to proceed against goods for his freight, 869.

Or such an understanding may be inferred from plain local usage of particular port, 869.

If master demands freight immediately on completing the

[REFERENCES ARE TO SECTIONS.]

FREIGHT—Carrier's lien for freight—con.

discharge, notice of non-abandonment of lien served at once will preserve it, 869, note 37.

Intention of carrier to retain lien after delivery of goods not assented to by consignee, insufficient unless supported by local custom or usage to that effect, 869.

Lien waived when carrier bases his refusal to deliver on other grounds, 869.

Lien not lost where delivery made to one to whom consignee has made an assignment for the benefit of his creditors, 869.

Lien in such case follows the fund realized on the property delivered, 869.

When part of goods delivered, carrier may retain balance till freight on whole consignment paid, 870.

- Partial delivery will not be taken as constructive delivery of whole, or as waiver of lien, unless parties so intended, 870.

Intention of parties a question of fact, 870, note 42.

Carrier may demand security for entire freight before delivering any portion of goods, 870.

Consignee refusing, carrier may store at his expense, 870.

Carrier cannot insist on payment of freight by parcels, 870.

Rule different in England, where carrier may require freight to be paid upon each parcel as delivered, 870, note 43.

When delivery procured by trick or fraud of consignee, lien for freight not discharged, 871.

- Or when promise to pay on delivery, which consignee fails to do, 871.

In such case, carrier may retake possession by writ of replevin, 871.

Lien of carrier has precedence over claim of general creditor of owner or consignee, 872.

Or of pledgee who has procured the property to be transported and stored, 872, note 46.

But lien inferior to that of mortgagee of whose rights carrier had both constructive and actual knowledge before it accepted goods for transportation, 872, note 46.

Creditor of owner or consignee levying on goods in possession of carrier must pay freight, 872.

In which case, substituted to lien of carrier, 872.

Lien of carrier superior to right of stoppage *in transitu*, 872.

Even after part delivery carrier may maintain his lien for

[REFERENCES ARE TO SECTIONS.]

FREIGHT—*Carrier's lien for freight*—con.

- whole charges on balance undelivered, as against vendor's right of stoppage *in transitu*, 872.
- But lien for general balance, good as between carrier and consignee, cannot prevail against vendor's right of stoppage, 872.
- Conditional vendor of goods, who authorizes vendee to ship and use them, estopped from disputing carrier's lien for freight, 873.
- Lien lost where carrier is liable for damages to goods equal to or exceeding the freight charges, 874.
- Lien of carrier may be waived without express agreement to that effect, 875.
- Such agreement may be inferred from terms of payment agreed upon, 875.
- Lien waived where time for payment postponed to future date beyond time for delivery, 875.
- Waived by implication when provision in bill of lading inconsistent with, 875.
- Such agreement must be express or implication clear, 875.
- Waiver by taking acceptance payable after delivery, 876.
- But presumption exists in favor of the existence of the lien, 877.
- Terms of special agreement to constitute a waiver must be absolutely inconsistent with retention of goods, 877.
- If delivery can be rightfully postponed beyond date for payment of freight, lien not waived, 877.
- Particular words in bill of lading construed in favor of existence of lien, 878.
- Meaning of "discharge" of vessel, 878.
- Effect of failure of freighter where notes given for freight for accommodation of carrier, 878.
- Extension of credit no waiver of lien when credit is given on condition that freighter shall furnish security for its payment, or deliver to the carrier bills and notes for the amount, unless condition is fulfilled according to the agreement, 879.
- Consignee failing to pay freight, carrier may store at his expense, when, 880.
- In such case warehouseman holds for carrier, 880.
- Deposit may be made in name of carrier, 880.
- Such deposit neither a conversion of the goods nor a discharge of the lien, 880.

[REFERENCES ARE TO SECTIONS.]

FREIGHT—*Carrier's lien for freight—con.*

Warehouseman liable in such case to carrier as for a conversion of them, and for full amount of his freight, if he delivers the goods without payment of freight, 880.

While holding goods in pursuance of his lien, carrier not an insurer, 881.

Bound to use reasonable care in respect of goods, 881.

Whether carrier has a lien on goods wrongfully shipped by one who is not owner—

In England, lien attaches in favor of carrier and innkeeper, in such case, 882.

How right of carrier compares with that of innkeeper, 883.

In America, rule different as to carriers, 884.

Rights of connecting road no better in this respect than those of initial carrier, 884.

But lien exists where goods are received from one clothed with apparent authority by owner, 885.

Connecting carrier not to be deprived of his lien because first carrier, by mistake or otherwise, sends goods to wrong place or by wrong route, 885.

Unless he has good reason to know that goods were delivered to him in violation of owner's instructions, 885.

Property of United States government subject to lien like that of private person, 886.

Lien discharged by tender—

Lien is discharged by a tender of performance, when refused by bailee, 887.

Lien not assignable—

Personal privilege, and does not pass by sale or pledge, 888.

Carrier cannot sell goods for his charges—

Sale by carrier without authority to enforce lien is a conversion, 889.

If statute exists, sale must be conducted in accordance with, and upon notice provided by statute, 889.

FREIGHT AGENT (See AGENT)—

FREIGHT CARS—

Stowage upon freight cars of railroad companies, 610.

Defective ladders on, 911.

Placing freight cars in such a position that injury may happen to passengers on passing passenger trains, 913, note 32.

Passenger getting upon to pass to caboose, chargeable with contributory negligence, 1188.

[REFERENCES ARE TO SECTIONS.]

FREIGHT TRAINS—

In operation of, passenger carrier not held to degree of care towards passengers which would destroy use of such trains for their primary purpose, 899.

Same accommodations not required on freight, as on passenger trains, 922.

Collision of freight and passenger trains, 923.

When running of a freight train between passenger train and station is negligence, 923, note 18.

Freight train blocking passage to station, 937.

Freight trains need not have all safety appliances used on passenger trains, 952, note 6.

Railroad companies may lawfully refuse to carry passengers on freight trains, 964.

Where railroad company has so divided traffic, presumption is that person riding on freight train is not a passenger, 964.

But this presumption may be overcome by showing long continued and notorious disregard of such a regulation, 964.

Railroad company may exclude passengers from "pay train," 964, note 1.

No presumption that freight train carries passengers from fact that it has caboose attached, 964, note 2.

Person relying on long continued and notorious disregard of company's regulation not to carry passengers must not have known of the company's regulation, 964, note 3.

In absence of rule or established custom, presumption is that those in charge of freight trains have no authority to accept passengers, 964.

Presumption may be overcome by order of superior officer of conductor, 964, note 4.

Some courts, however, hold that person applying may rely on authority of conductor, 964.

But he has no right to rely on authority of a brakeman, 964.

So he cannot claim rights of passenger where he colludes with conductor, 964.

And conductor certainly cannot authorize him to ride upon engine, 964.

Where railroad company receives and undertakes to carry passengers on freight train, it cannot secretly limit conductor's authority, 964.

And person entering train at direction of station agent is not a trespasser, 964.

[REFERENCES ARE TO SECTIONS.]

FREIGHT TRAINS—con.

If ejected while train is in motion, or at a dangerous or improper place, carrier liable, 964.

Passenger must comply with railroad's reasonable requirements for riding on freight trains, 964.

And must accept the necessary incidents and inconveniences thereof, 964.

Where freight trains carrying passengers must stop, 1110.

Jerks and jars on freight trains, 1111.

Passenger going around, to reach depot, chargeable with contributory negligence, 1188.

Passenger riding on, care to be exercised by, 1217.

Passenger riding on, assumes those risks that are ordinarily incident to its proper management, 1217.

Passenger riding on, bound to exercise for his safety a degree of care commensurate with increased dangers ordinarily incident to its proper management, 1217.

Failure of passenger to exercise such care will be contributory negligence, 1217.

Seat, in caboose, passenger sitting on arm of, chargeable with contributory negligence, 1217.

Chair, in caboose, passenger sitting tilted back in, chargeable with contributory negligence, 1217.

Seat, in caboose, passenger lying down in, so that head is likely to bump against frame work, chargeable with contributory negligence, 1217.

Caboose, standing in, when in motion, usually contributory negligence, 1217.

But circumstances may excuse passenger's conduct in standing in caboose when in motion, 1217.

Leaving seat in caboose to get drink of water, not contributory negligence as a matter of law, 1217, note 14.

Standing in caboose, not contributory negligence when seats full, 1217, note 14.

Rising from seat of caboose and moving toward door after name of station called, not contributory negligence, 1217, note 14.

FRESHET—

Lodging snag in river, whether act of God, 270.

Whether extraordinary freshet is act of God, 282, 291.

Loss by freshet where carrier has agreed to carry in prescribed time, 627.

Delay through washing away of bridge by freshet, 654.

[REFERENCES ARE TO SECTIONS.]

FRIGHT—

Damages for, not recoverable unless accompanied by bodily injury, 1427.

But where nervous shock so great as to cause bodily injury, it may be considered as an element of damage, 1427.

Carrier of animal does not warrant against consequences of fright of animal, 336, 337, 338.

FROST (See COLD; FREEZING)—

Water and steam pipes in vessel should be protected from frost before sailing, 374.

Breaking of rail through frost, 948, note 49.

FRUIT (See PERISHABLE GOODS)—

What constitutes a contract for through transportation of fruit, 239.

Carrier not liable for decay or deterioration of perishable fruits, 334.

Should be carried in refrigerator cars, 505, note 33.

Custom to sell fruit at auction before delivery by carrier by water, 700, note 11.

Not baggage, 1249.

FRUIT BOYS—

Duty of passenger carrier towards, 1018.

FUNERAL—

When charterer chargeable with demurrage for days on which labor organizations attended a funeral, 837, note 55.

FUNERAL EXPENSES—

Recovery of, by parent, 1378.

FURNITURE—

Not baggage, 1244.

FURS—

Duty of carrier when furs become wet during transportation, 631.

GAMBLERS—

Carrier may refuse to accept, as passengers, 966, note 16.

GAME WARDEN—

Seizure of fish by, 742, note 21.

GANG-PLANK—

When carrier liable for failure to have gang-plank properly secured, although immediate cause of injury was negligent operation of another boat, 913.

[REFERENCES ARE TO SECTIONS.]

GANG PLANK—con.

Carrier must provide suitable gang-plank, 942.

Guard rails on, 942.

GANGWAY—

Reserved for freight, passenger voluntarily using, chargeable with contributory negligence, 1188.

GARNISHMENT—

Of carrier, effect of, 746-748.

Right of stoppage *in transitu* not defeated by garnishment by creditors of consignee, 763.

GASOLINE—

Liability of passenger carrier for injury to passenger through explosion of gasoline brought into car by another passenger, 921, note 10.

GAS TANK—

Liability of passenger carrier for injury due to explosion of, 919.

GATE—

Passenger climbing over locked gate in leaving station, 937.

GATE-KEEPER—

Passenger may be required to exhibit ticket to, 1032.

Carrier liable if he wrongfully refuses admission, 963, note 44.

Assault on passenger by, 1099, note 34.

Waiver of conditions on ticket by, 1054, note 44, 1058, note 3.

GENERAL AVERAGE CONTRIBUTION—

Effect of Harter Act on, 387.

Effect of wrongful carriage on deck on, 603.

Effect of carriage on deck in accordance with custom of particular trade, 605.

GENERAL LANGUAGE (See CONSTRUCTION OF CONTRACTS)—

Will not relieve carrier from consequences of negligence, 452, note 25, 463.

GIFT—

Carrier cannot give away the goods, 794.

“GLASS—WITH CARE—THIS SIDE UP”—

Effect of such a mark on package, 611.

GOAT SKINS—

Improper stowage of, 606, note 32.

GOLD—

Delivery of, to one not entitled to it, 669, note 16.

[REFERENCES ARE TO SECTIONS.]

GOLD DUST—

Carriage of gold dust by unsafe route, 614.

"GOOD FOR ONE SEAT"—

Meaning of, in ticket, 1046, note 17.

"GOOD FOR THIS DAY AND TRAIN ONLY"—

Meaning of, in tickets, 1060, note 9.

"GOOD FOR THIS TRIP ONLY"—

Meaning of, in ticket, 1046, note 17.

"GOOD FOR TWENTY DAYS"—

Meaning of, in ticket, 1046, note 17.

"GOOD ON PASSENGER TRAINS ONLY"—

Meaning of, in ticket, 1060, note 9.

GOOD FRIDAY—

When demurrage allowable for cessation of work on, 837.

"GOODS"—

Meaning of word "goods" when used in defining business of common carrier, 90.

GORING—

Carrier of animal does not warrant against consequences of its goring, 336, 337, 338.

GOVERNMENT—

Property of, subject to carrier's lien, 886.

GOVERNOR—

Statements of governor of state immaterial on question of reasonableness of rates, 578.

GRANDCHILDREN—

Recovery by, in actions for death by wrongful act, 1395.

GRATUITOUS BAILEE (See BAILMENT AND CARRIERS WITHOUT HIRE)—

Carrier only liable as, for baggage, where passenger lies over without consent of carrier and permits baggage to go on, 1280.

Carrier only liable as, for baggage, where passenger carried gratuitously, 1300.

GRATUITOUS CARRIAGE OF PASSENGERS—

Does not constitute one a carrier of passengers, 61, note 22.

GRATUITOUS PASSENGER—

Baggage of, carrier only liable for, as gratuitous bailee, 1300.

Burden of proof on, to show baggage lost through gross negligence, 1300.

Cannot recover in action of *assumpsit* for loss of baggage, 1332.

[REFERENCES ARE TO SECTIONS.]

GRAVITY ROAD—

Liability of railroad company where it permits gravity road to be used in connection with its track, 925, note 32.

GREASE—

Accumulation of, on station platform, 935.

GROCERIES—

Not baggage, 1249.

Conditions in ticket against carrying groceries as baggage, 1052, note 36.

GUARANTY—

In the absence of express authority agent of carrier cannot guarantee price of C. O. D. goods, 732.

Guaranty of freight by shipper, 800.

GUN (See FIREARMS)—

When baggage, 1254.

GUN CASE—

When baggage, 1244.

GUNPOWDER—

Carrier not bound to accept for carriage, 145, note 3.

HACKMAN—

Railway company cannot prohibit entrance of passenger's own carriage to station grounds to carry him or his goods to or from the train, 944.

Nor entrance of carriage of hackman, which by contract made elsewhere with passenger, has become carriage of passenger *pro hac vice*, 944.

Right of railroad company to grant exclusive right to certain favored hackmen to solicit patronage in its station or grounds in dispute, 944.

Right to grant such exclusive privilege upheld by courts of England, by the Supreme Court of the United States, and by the Supreme Courts of Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island and Virginia, 944.

Hackmen and cabmen may, however, use a public sidewalk in prosecuting their calling, if such use is not materially obstructive, 944.

Right to grant exclusive privilege to favored hackmen denied in Indiana, Kentucky, Michigan, Missouri, Mississippi, Montana, and possibly by the Supreme Court of Illinois, 945.

[REFERENCES ARE TO SECTIONS.]

HACKMAN—con.

This view based on theory that passenger should not be exploited by creation of monopoly, 945.

But under latter view railroad company may make reasonable regulations as to where hacks or cabs shall stand, 945.

HACKNEY COACHES—

Owners of, common carriers when, 68.

HACKS—

Degree of care as to safety of passengers required of proprietors of hacks, 898, note 17.

HALYARDS—

Liability of passenger carrier for defective, 911.

HAND—

Injury to passenger's hand by sudden closing of door or window on carrier's vehicle, 927.

Placing of, by passenger, where it is likely to be caught by closing of car door, no excuse to carrier where servant, with knowledge of position of passenger's hand, heedlessly closes door, 1173, note 1.

HAND-BAG—

Dropped out of car window, liability of carrier for, 1267.

HAND-CAR—

Riding upon, 1000, 1205.

HARTER ACT—

Policy of United States courts towards carriers by water changed by Harter Act, 345.

Statute similar to Harter Act in Great Britain, 346.

To what vessels and property Harter Act applies, 347.

Damages for personal injuries to passenger or for loss of baggage not within provisions of Harter Act, 347.

Harter Act only modifies relations between a vessel and her cargo, 348.

Stipulations in bills of lading contrary to section one of Harter Act are void, 349.

Meaning of word "loading" in section one of Harter Act, 350.

Stowage used in two senses in section one of Harter Act, 351.

Stowage with a view to the proper trim of the vessel, 352.

Carrier liable if vessel too heavily laden and damage results to cargo, 352.

Responsibility for such stowage rests upon the carrier alone, 353.

[REFERENCES ARE TO SECTIONS.]

HARTER ACT—con.

Stowage with reference to the natural characteristics of the cargo carried, 354.

Stowage of liquid cargo, 355.

Duty of ship to provide proper dunnage, 356.

Stowage of delicate and easily tainted goods, 357.

Goods should be secured from possibility of shifting, 358.

Proper stowage at commencement of voyage may be made improper by change of vessel's trim during voyage, 359.

Negligence in delivery of cargo within the first section of the Harter Act, 360.

Vessel is liable for failure to deliver at all through master's negligence in overlooking goods, 361.

Second section of Harter Act is the complement of section three, 362.

Effect of sections two and three on the warranty of seaworthiness, 363.

Effect of "due diligence," 363.

Liability for latent defects, 364.

Exemption clauses in bills of lading strictly construed, 365.

The test of seaworthiness, 366.

Burden of proof on carrier to prove vessel seaworthy or due diligence was used to make her seaworthy, 367.

Warranty of seaworthiness extends to time when vessel actually breaks ground for the voyage, 368.

Vessel must be seaworthy at each stage of the voyage, 368.

Vessel liable for initial instability, 369.

Presumption of unseaworthiness when leaks soon happen in ordinary weather, 370.

Leaking decks or hatches, 371.

Defective rivets or bolts, 372.

Unfastened ports, 373.

Water and steam pipes, etc., 374.

Bulkheads, 375.

Insufficiency of coal, 376.

Defective fog horns, 377.

Deviations in compass, 378.

Vessel should be cleaned and repaired often and well, 379.

What is due diligence, 380.

Vessel owner responsible for acts of his agents, 380.

Proof of inspection of general character insufficient, 380.

Due diligence in manning vessel, 381.

[REFERENCES ARE TO SECTIONS.]

HARTER ACT—con.

Faults or errors in management of vessel, 382.

Faults or errors in navigation of vessel, 383.

Dangers of the sea, 384.

The inherent defect, quality or vice of the thing carried, 385.

Effect of deviation, 386.

Effect of Harter Act on damages recoverable by cargo owner or on rights of a general average contribution, 387.

Construction of fourth section of Harter Act, 160, note 37.

HATCHES—

No presumption of unseaworthiness because hatches leak after a continuous gale, 371.

But improperly caulked hatches may make vessel unseaworthy, 371.

Negligently caulked hatches are not a peril of the sea, 488, note 56.

Delivery from one only of two hatches of a ship, 834, 840 and 840, note 1.

HATCHWAY—

Carrier liable for injury to passenger from leaving hatchway open in hulk used by him in embarking passengers, 916.

HAY—

Carrier not liable for sweating of hay, 385.

Deposit of hay for immediate shipment, effect of, 115, note 33.

HAZY WEATHER—

Whether hazy weather, causing mistake in beacon light, is act of God, 278.

HEAD—

Passenger protruding, through car window, chargeable with contributory negligence, 1215.

No excuse that passenger was irresistibly compelled to vomit, 1215, note 16.

HEADLIGHTS—

Need not be of most approved pattern in use, 952, note 6.

HEALTH—

Loss of, a proper element of damage, 1423.

HEAT—

Duty to supply vehicles with, 922.

Duty to supply waiting-rooms with, 931.

[REFERENCES ARE TO SECTIONS.]

HEATING—

Carrier may stipulate for exemption from liability for loss due to heating of live stock, 419.

When a peril of the sea, 489, note 60.

HELPING PASSENGERS—

To enter train, 1112.

To alight, 1127.

HIRE—

Carriage must be for hire to constitute a common carrier, 61.

HOGS (See LIVE ANIMALS)—

Delivery of hogs to carrier, 105, 114.

Duty to apply water to over-heated hogs, 634.

Carrier should prevent hogs from "piling up," 634, note 36.

Liable if he smothers hog by placing it in steam-heated car, 634, note 36.

Delay in shipment of, 652, note 20.

HOLE—

In station platform, 933.

HOLIDAY—

Delivery of goods upon, 692.

When Sundays alone excepted, charterers not exempt from demurrage for holidays and days on which laborers will not work, 837.

Half holidays not made obligatory by statute usually not excepted, 837, note 55.

Consignee not liable for delay due to a vessel arriving on a legal half holiday, 848.

No obligation on part of consignee to keep his office open on a legal half holiday, 848.

HOOP SKIRT—

When railway company liable for injury due to, 911, note 23.

HORSES (See LIVE ANIMALS)—

Escape of horses through car window or door, 333, note 7.

Carrier not liable when horse, becoming frightened, breaks his bridle and runs away, 342, note 1.

Injury to horses by being put into an insufficient truck, 397, note 16.

Carriage of horses at owner's risk, 397, note 16.

Injury to horses by bottom of car giving way, 465.

Directions of shipper as to mode of carriage must be followed, 611.

[REFERENCES ARE TO SECTIONS.]

HORSES—con.

Negligence in management of vehicles containing horses, 639.

Injury by horse on station platform, 940.

HOSE—

Negligently leaving hose on station platform in dangerous position, 935.

HOTEL-KEEPERS—

Regulating admission of, to depots, 943.

HOUSEHOLD GOODS—

Stowage of, 602, note 18.

Not baggage, 1244, 1249.

Measure of damages for loss of, 1363, note 8.

HOYMEN—

When common carriers, 65.

HUMILIATION—

When passenger may recover for, 1066, 1084, 1433, 1441.

HURRICANE—

Whether hurricane is act of God, 286.

HURRICANE DECK—

Passenger going upon, by direction of officer, not chargeable with contributory negligence, 1195.

HUSBAND—

Right of action for injury to wife, 1379.

Effect of his negligence on wife's action, 1383.

Effect of wife's negligence on his action, 1383.

May recover for loss of wearing apparel of wife, 1276, note 11.

Where traveling with wife on tickets purchased by him, may recover in *assumpsit* for loss of wife's baggage, 1277.**ICE—**

Delay in transportation of goods through obstructions by ice, 655.

Delay of ship through ice, effect on demurrage, 852.

Ice on station platform, 935.

Accumulation of ice on customary route for egress from station, 937, note 29.

On stairways of station, 937, note 33.

On car platform, 957.

On deck of ferry-boat, 957, note 14.

On platform of express car, no duty to remove, 957, note 18.

Passenger jumping from moving car upon, chargeable with contributory negligence, 1180, note 10.

[REFERENCES ARE TO SECTIONS.]

ICING CARS—

Provisions in bill of lading for icing cars as evidence of contract for through transportation, 239.

Duty of carrier or shipper as to icing or re-icing cars, 505, 645, note 5.

IDENTIFICATION—

Of passenger with his carrier, 1235, *et seq.*

Round-trip tickets requiring identification, 1054.

IDENTITY—

Proof of identity of person to whom delivery is made by carrier should be required, 668.

Qualified refusal of carrier to deliver goods until identity of owner is established is not a conversion, 668.

ILLEGALITY—

Carrier entitled to indemnity from owner or shipper for loss from goods being of an illegal character without his knowledge, 863.

ILLEGITIMATE CHILDREN—

Recovery by, in actions for death by wrongful act, 1395.

IMBECILES—

Imputability of the negligence of those who have, in charge, 1229.

IMPLIED AUTHORITY (See AGENT; STATION AGENT)—

Implied power of agents to make contracts for through carriage, 241.

Implied authority of agents to agree to furnish cars on given day, 630.

IMPLIED PROMISES AND CONTRACTS—

Consignee accepting goods, promise to pay freight implied, 807.

Contract to pay may be implied from previous course of dealing, 807.

New implied contract as to freight when carrier delivers to assignee of bill of lading, 808.

No implication of contract of consignee to pay freight when known not to be the owner, 809.

When charter party or bill of lading silent as to time of loading or discharge, implied obligation arises to load or discharge with reasonable diligence, 842.

IMPLIED TERMS—

In bill of lading, cannot be varied by parol, 168.

[REFERENCES ARE TO SECTIONS.]

IMPORT DUTIES—

Carrier's lien includes, 866.

IMPOSITION—

Will not excuse delivery by common carrier to wrong person, 668.

But may excuse when carrier is holding as warehouseman, 681.

IMPOSSIBILITY OF PERFORMANCE—

No excuse when carrier has contracted to carry in prescribed time, 625.

Carrier not entitled to compensation where transportation to destination becomes impossible, 818.

IMPOSTER—

Delivery by carrier to, 669, *et seq.*

IMPROVEMENTS—

Common carrier—

When carrier bound to adopt, 503.

Passenger carrier—

Liable for failure to adopt known and generally used improvements conducive to safety of passengers, 952.

Not bound to use every possible means to avoid injury which highest degree of skill and ingenuity might suggest, 952.

Nor for failing to adopt untried machine or mode of construction, 952.

Use of open and closed steps on stage coaches, 952, note 5.

Use of chain between railings on rear platform of passenger car in mixed train, 952, note 5.

Use of switches of improved patterns, 952.

If old cars used, they must be kept in good repair, 952, note 6.

Freight trains need not have all safety appliances used on passenger trains, 952, note 6.

Headlights need not be "of the most approved pattern in use," 952, note 6.

All ferry-men need not necessarily use the same safety appliances, 953.

Liability of vessel for latent defects, 953, note 8.

Use of brass covering on stairs of steamboat, 953, note 8.

Duty of railroad company to maintain "whip lashes" near overhanging structures or bridges, 954.

Injury to stockmen passing over freight car by snow shed, 954.

[REFERENCES ARE TO SECTIONS.]

IMPROVEMENTS—*Passenger carrier*—con.

Duty of railroad company to maintain fences along right of way to keep animals off track, 955.

Duty imposed by statute in some states, 955.

IMPUTED NEGLIGENCE—

When negligence will be imputed to child, 1228.

Imputability of the negligence of those who have infants or imbeciles in charge, 1229.

Whether negligence of passenger's carrier can be imputed to him when passenger injured by concurrent negligence of another, 1235.

Under former English rule of *Thorogood v. Bryan*, passenger regarded as so far identified with his carrier as to make him a sharer in carrier's negligence, 1235.

English rule generally denied in United States, 1236.

English criticism of the rule, 1237.

Final overthrow of rule in England, 1238.

"IN CABIN STATE-ROOM"—

Effect of marking package thus, 611.

"IN CARE OF"—

Effect of consigning goods in care of an agent of the carrier, 675.

Or in care of another person, 676.

Consignee for care merely agent; no title vests in, 809.

No implication of contract to pay freight by person in whose care goods are shipped, 809.

INCIDENTAL DAMAGE—

Flowing proximately from loss of goods, may be recovered, 1360.

INCONVENIENCE—

Passenger not justified in incurring danger to avoid, 939.

Avoiding, when negligence, 1225.

Fact that to remain on train will subject passenger to, no excuse to him for attempting to alight while train in motion, 1177.

Fact that failure to get upon train will subject passenger to, no excuse to him for attempting to board train while in motion, 1181.

Is a proper element for damage in action for injury to passenger, 1424.

INCREASE—

Carrier cannot be gainer by an increase of bulk or weight during voyage, 813.

[REFERENCES ARE TO SECTIONS.]

INDECENT ASSAULT—

Carrier liable for, by his servants, when, 1101.

INDEMNITY—

Right of carrier to indemnity when adverse claim set up to property, 752.

Carrier entitled to indemnity from owner or shipper for loss from dangerous goods imposed on him without his knowledge, 863.
Or from goods being of an illegal character without his knowledge, 863.

Passenger carrier may enter into contract of indemnity with insurance company, 1076.

INDEPENDENT CONTRACTOR—

Liability of passenger carrier for negligence of independent contractor, 919.

INDORSEE—

Of bill of lading, 175, *et seq.*

Liability of indorsee of bill of lading for freight, 808.

Liability of indorsee of bill of lading for damages in the nature of demurrage, 853, note 55.

INFANT (See CHILD)—

Cannot maintain action against carrier for injuries received before birth, 1020.

How infancy affects contributory negligence of passenger, 1227.
Same care and caution not exacted of, as in case of adult, 1227.

When negligence will be imputed to, 1228.

Whether infant to be charged with contributory negligence, question for jury, 1228.

Imputability of the negligence of those who have infants in charge, 1229.

INFERENCE—

Carrier's exemption from liability cannot arise from inference, 402.

INHERENT NATURE—

Of goods, carrier not liable for losses from, 334.

See LIVE ANIMALS.

Damage from inherent defect of goods excepted by Harter Act, 385.

Carrier entitled to freight, though goods have become worthless through natural decay, 802.

[REFERENCES ARE TO SECTIONS.]

INJUNCTION (See MANDATORY INJUNCTION)—

INJURY TO GOODS—

Measure of damages for, 1362.

INNKEEPER—

How common carrier compares with innkeeper, 58.

Lien of, 882, 883.

Sleeping-car company not liable as, for baggage of passenger, 1130, 1273.

“IN REGULAR TURN”—

Prima facie mean regular turn at port of loading, 847.

But it may be shown that words were intended to have a different meaning, 847.

Vessels arriving first entitled to priority in loading, 847.

INSANE PERSON—

Carrier may refuse as passenger, 966, 968.

Ejection of keeper with, 976.

INSANITY—

Produced through hardship attending an accident, carrier not liable for, 1427, note 27.

INSOLVENCY—

Of vendee as prerequisite to exercise of right of stoppage *in transitu*, see STOPPAGE IN TRANSITU, 757, *et seq.*

INSPECTION OF GOODS—

Effect of removal of portion of goods from car where goods sent subject to order of consignor to notify the consignee for the purpose of inspection, 668, note 15.

Goods must be separated by carrier by water so as to allow consignee an opportunity for inspection, 691.

Carrier must afford consignee opportunity to inspect the goods, 733.

Carrier by water cannot detain goods on board vessel where consignee would have no opportunity of examining their condition, 864, note 14.

INSPECTION OF ROADS AND BRIDGES—

Responsibility of railway company for inspection of bridges, 910.

INSPECTION OF VEHICLES—

Common carriers—

Proof of inspection of a general character only is insufficient in proving due diligence to make a vessel seaworthy, 380.

[REFERENCES ARE TO SECTIONS.]

INSPECTION OF VEHICLES—*Common carriers*—con.

Carrier cannot devolve on shipper the duty of inspecting vehicle, 498.

Vehicles must be inspected while in transit, 501.

Effect of inspection of vehicle by shipper, 508.

Passenger carriers—

Examination should be made of vehicle immediately previous to each journey, 956.

Rule even more stringent as to steamboats and railways, 957.

Cursory inspection of conductor or brakeman need not be as exhaustive as a regular inspection while the train is at rest, 957.

Such inspection cannot be continuous, 957.

Railroad company not therefore liable for accidental locking of door of water-closet on female passenger, 957.

Or until it has had an opportunity to remove it for accumulations of snow or ice, vomit or mud on steps or platform of car while en route, 957.

Vessel not liable for failure to keep floor constantly dry around water cooler in steerage of vessel, 957, note 14.

Nor for injuries to passenger due to falling over socket for table in dining saloon, when passenger is cognizant of its presence, 957, note 14.

Liability for ice on deck of ferry-boat, 957, note 14.

No legal duty on railroad company to remove ice from railing or platform of express car, 957, note 18.

Railroad company not liable for persistence of passenger in getting off at end of car where there is snow or ice, when conductor is assisting passengers in alighting at other end, 957, note 18.

Inspection required while cars are at rest is much stricter than when in motion, 957.

This vigilance extends to sleeping cars owned by another company, but used by its passengers, 957.

Liability for snow and ice on car steps before car starts, 957, note 21.

INSTABILITY OF VESSEL—

Vessel liable for damages to cargo due to initial instability, 369.

No usage can validate navigation by unstable ships, 369.

[REFERENCES ARE TO SECTIONS.]

INSTRUCTIONS (See DIRECTIONS)—

Whether carrier has lien when goods shipped in violation of owner's instructions, 882-885.

Right of passenger to rely upon, 1067.

Duty of carrier to give, 1129.

INSULT—

Carrier must protect passenger from, 980, *et seq.*

When aggravates damages, 1433, 1441.

Where passenger subjected to, compensation for mental suffering may be recovered, 1427.

INSULTING LANGUAGE—

How when maltreatment of passenger by carrier's servant provoked by, 1102, 1434.

Used by passenger toward carrier's servant, will not justify latter in assaulting passenger, 1434.

But where assault upon passenger by carrier's servant is provoked by insulting language of passenger, carrier may offer proof of passenger's language in mitigation of damages, 1434.

Rule that such proof may be offered in mitigation of both compensatory and exemplary damages, 1434.

Rule that such proof is admissible in mitigation of exemplary damages only, 1434.

INSURANCE—

Effect of unreasonable delay upon insurance, 307.

Warranty of seaworthiness does not imply a warranty of insurability at usual rates, 366, note 49.

Carrier cannot require shipper in England to insure the goods, 397, note 16.

Contract that carrier shall have benefit of insurance on goods construed to cover loss or damage to goods themselves, and not to damage from delay, 464, note 34.

If shipper cannot procure insurance on cattle on account of bad ventilation, he may refuse to ship and recover damages, 635.

Carrier's right to insure goods carried, 783.

May procure floating or shifting policy, 783.

When carrier procures insurance for full value of goods, he is trustee for the owners of the goods for the amount, after deducting the value of his own interest for advances and freight, 783.

Carrier may contract with shipper for benefit of any insurance latter may effect on goods, 784.

[REFERENCES ARE TO SECTIONS.]

INSURANCE—con.

But cannot insist on such insurance for his benefit as a condition of receiving the goods for carriage, 784.

When insurance company may recover from carrier, 784.

Effect of, on life of deceased in actions for death by wrongful act, 1397, note 28.

INSURANCE COMPANY—

Right to recover from carrier for loss of goods, 784.

In action by insurance company against carrier, declarations or admissions of agents of insurance company are immaterial, 784, note 18.

Passenger carrier may enter into contract of indemnity with, 1076.

INSURANCE POLICY—

Carrier cannot show benefit of, in diminution of damages, 1423.

INSURER—

Carrier of goods liable as, 265.

Carrier not an insurer of live stock against the consequences of its own vitality, 335, 336, 337, 338.

But carrier is liable as an insurer of animals except for losses caused by their peculiar nature, 339.

Shipper must be allowed real freedom of choice between restricted or common-law liability, 404.

Carrier accepting goods with directions to carry in particular mode or by particular route, bound to follow such directions, 611.

Carrying in different mode or by different route he becomes insurer, exceptions in contract to the contrary notwithstanding, 611.

Carrier becomes insurer, notwithstanding loss by excepted cause, if occasioned by his negligence. See NEGLIGENCE and LIMITATION OF LIABILITY BY CONTRACT.

If goods not shipped according to directions carrier liable even though loss occurs on connecting line, 611, note 42.

So initial carrier becomes liable as insurer if goods are delivered to other than designated carrier, or are wrongfully intrusted to another carrier, 611, note 42.

Carrier liable as insurer if contract is to carry by "all rail" and he carries by water, 618.

When carrier holds as warehouseman, he is no longer an insurer of the safety of the goods, 681-684.

[REFERENCES ARE TO SECTIONS.]

INSURER—con.

While holding goods in pursuance of his lien, carrier not an insurer, 881.

Carrier of passengers not insurer of their safety, 892.

Negligence essential to recovery against, 892.

Not liable for injury sustained at hands of lawless persons, except in case of negligence, 892.

Not insurers against injuries to passengers through mere accident, 893.

INSURRECTION—

Not war, 317.

INTENTION—

Of carrier to retain lien after delivery of goods not assented to by consignee, insufficient unless supported by local custom or usage to that effect, 869.

Intention of parties as to effect of partial delivery on carrier's right of lien is a question of fact, 870.

How intention affects passengership relation, 1014, 1015.

INTERCHANGE OF TRAFFIC—

Discrimination in affording facilities for interchange of traffic under the Interstate Commerce law, 568.

INTEREST (See DAMAGES)—

Carrier usually entitled to earn a compensatory amount equal to usual and legal rate of interest, 582.

When allowed for loss of goods, 1360.

When allowed for injury to goods, 1362.

When recoverable as damages, 1366.

INTERMEDDLING—

Of owner with goods during transit, releases carrier, 333.

Wrongful delivery of goods by carrier while holding as warehouseman excused if induced by fraud, imposition or fault of sender or consignee, 681-684.

Carrier entitled to full freight if prevented by owner from completing journey, 801.

INTERMEDIATE AGENCIES—

Liability of passenger carrier for safety of, 916.

INTERMEDIATE CARRIER—

May be held liable for loss occurring on his line, 236.

See CONNECTING CARRIERS.

[REFERENCES ARE TO SECTIONS.]

INTERMEDIATE CONSIGNEE—

Not liable for freight, when, 809.

INTERMEDIATE PLACE—

When owner may elect to receive goods at intermediate place, 193-196, 660, 661, 735, 736.

Carrier entitled to full freight when owner elects to receive goods at intermediate place, 802.

INTERPLEADER—

Right of carrier to bring bill of interpleader when adverse claim set up to property, 752.

INTERPRETATION—

Lex loci contractus will generally govern in interpretation of rights arising out of contract of carriage, 201.

INTERRUPTION OF JOURNEY—

On interruption of journey carrier bound to make all reasonable efforts to preserve the goods transported, 644, 645.

Interruption of journey, while carrier is not at fault, caused by act of God, inclemency of weather, etc., does not justify carrier in terminating journey, 801.

INTERSECTING RAILROADS—

Liability of, for common depots and platforms, 938.

INTERSTATE CARRIAGE—

A state may require care and diligence of carrier, although contract is one for interstate carriage, 209.

What constitutes interstate carriage, 525, 576.

Carriage may be interstate and still not within scope of Interstate Commerce Act, 526, note 12.

A state has no control over interstate rates, 576.

INTERSTATE COMMERCE ACT—

Text of, 523.

Who are subject to the act, 524.

What shipments are subject to Interstate Commerce Act, 525.

Commission has power to establish joint rates under certain conditions, 526.

Effect of joint rates in bringing a railroad within the scope of the act, 526.

Principal objects of act, 527.

Express adoption of common law, 527.

Act must be construed broadly, 528.

Interests of carrier, shippers and public should be considered, 529.

[REFERENCES ARE TO SECTIONS.]

INTERSTATE COMMERCE ACT—con.

- Interests of public predominant on questions of reasonableness of rates, 530.
- Railroad companies cannot graduate charges according to prosperity of industries, 530.
- Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.
- Weight and bulk of articles should also be considered in fixing a reasonable rate, 531.
- Mileage is not the controlling factor in fixing a reasonable rate, 532.
- On questions of reasonableness of rates, a comparison of rates is of small importance, 533.
- Greater flow of traffic in one direction will justify lower rate in that direction, 533.
- Summer and winter rates may vary, 534.
- Second section of Interstate Commerce Act modeled on English act, 535.
- Purpose of second section, 536.
- Discriminative interstate contracts void under Interstate Commerce Act, 537.
- Even when rates given by mistake, 537.
- Discrimination must be unjust, 538.
- Milling in transit agreement not necessarily discriminative, 538.
- Compressing cotton in transit need not amount to unjust discrimination, 538.
- Contract is governed by classification sheets in force at date of shipment, 537, note 39.
- Shippers must be placed on an absolute equality, 539.
- Special rebates void, 539.
- A lower through rate not necessarily discriminative, 540.
- Discrimination may be in passenger service, as well as property, 541.
- Reasonableness of rates not necessarily involved in section two, 542.
- Distinction between wholesale rates in freight and passenger traffic, 543.
- Party rates, 543.
- Car load usual unit in fixing freight rates, 544.
- Rebate equal to cartage charges is discriminative, 545.
- Payment of carrier's prior debt by carriage as discrimination, 546.
- Agreement for rebate does not void contract of carriage, 547.

[REFERENCES ARE TO SECTIONS.]

INTERSTATE COMMERCE ACT—con.

Effect of section two on limitations on the value of goods in bills of lading, 548.

Question of relative rates is involved in section two, 549.

Failure to pay expenses no excuse for unjust discrimination, 550.

Third section of Interstate Commerce Act modeled on English act, 551.

Section three embraces every form of unjust discrimination, 552.

Relative rates important under section three, 552.

Questions of undue or unreasonable prejudice or preference are questions of fact, 553.

Origin of goods immaterial under section three, 554.

Carriage of articles or commodities manufactured, mined or produced by carrier, 555.

Section three applies to timber and manufactured products thereof which are excepted by section one, 555.

Railroad cannot build up one port at expense of another by preferential rates, 555.

Discrimination in carriage of live stock and affording proper facilities under section three, 556.

Discrimination in coal car distribution under section three, 557.

Agreement between railroad company and shippers as to coal car distribution cannot do away with obligations of section three, 557, note 21.

Effect of shipper furnishing cars, 557.

Third section applies as well to passenger as to freight traffic, 558.

Real and substantial competition justifies dissimilarity in rates under third and fourth sections of Interstate Commerce Act, 559.

Third section does not relate to acts, the result of conditions beyond control of carrier, 560.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Interests of shipper, carrier and public should be considered, 563.

Rules as to competition summarized, 564.

Condition that initial carrier shall have right to route beyond its own terminal is valid, 565.

Joint rate is not a basis for local rate, 566.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Discrimination in affording facilities for interchange of traffic, 568.

[REFERENCES ARE TO SECTIONS.]

INTERSTATE COMMERCE ACT—con.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Railroad need not afford same facilities to rival as to its own branch line, 568.

Mere distance no criterion of "substantially similar circumstances and conditions," 568.

Company transporting partly by railroad and partly by water not obliged to allow competitor use of its wharf, 568.

Question of similarity or dissimilarity of circumstances under section four is one of fact, 569.

Real and substantial competition a factor under section four, 570.

"Basing point system" is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Joint rate for long haul should not be less than local rate for short haul, 573.

Effect of Interstate Commerce Act on initial carrier's right to restrict his liability to his own line, 235.

INTERSTATE COMMERCE COMMISSION—

Under section one of Interstate Commerce Act may order switch connections, 523.

Under section six commission may modify requirements in respect to publishing, posting and filing of tariffs, 523.

Under section six commission may prescribe form of tariffs, 523.

Appointment and creation of Interstate Commerce Commission under sections eleven and twenty-four, 523.

Duty of commission to inquire into carrier's business under section twelve, 523.

Complaints to commission under section thirteen, 523.

Reports and decisions of the commission under section fourteen, 523.

Commission given power to fix a reasonable maximum rate under section fifteen of act, 523.

Commission may establish through routes and joint rates under section fifteen of Interstate Commerce Act, 523, 526.

Commission may award damages and modify its own orders under section sixteen of Interstate Commerce Act, 523.

Suits against commission regulated by section sixteen of act, 523.

Rehearings by commission under section 16a of act, 523.

[REFERENCES ARE TO SECTIONS.]

INTERSTATE COMMERCE COMMISSION—con.

Form of procedure before commission under section seventeen of act, 523.

Salary of commissioners regulated by section eighteen of act, 523.

Sessions of the commission under section nineteen of act, 523.

Commission authorized to require annual reports by section twenty of act, 523.

Commission may prescribe forms of account and records under section twenty of act, 523.*

Annual reports of commission to Congress under section twenty of act, 523.

Powers under section three of Elkins Act, 523.

INTERVENING CAUSE—

Liability of passenger carrier where injury is due to, 914.

INTOXICATED PERSONS—

Carrier may refuse as passengers, 966, 969.

May be ejected, 974 *et seq.*

Duty of carrier toward, 978, 980, 994.

Right to eject drunken passenger is subject to limitations, 978.

Care must be taken to expose person ejected to no unusual or unnecessary hazards, 978.

Conductor must use reasonable care and caution, 978.

May eject drunken passenger if it is reasonably certain he will become offensive or annoying to other passengers, 978.

Or if drunken passenger advises other passengers to refuse to pay fare, 978, note 36.

Or if he is guilty of using obscene and vulgar language, 978, note 36.

But mere breach of table manners in being drunk does not authorize carrier to eject passenger, 978.

Duty of carrier to restrain or eject drunken passengers, 984.

Liability of carrier where drunken passenger had assaulted another passenger than plaintiff before injuries to plaintiff occurred, 984, note 6.

Use of profane language before lady by drunken passenger after conductor failed to interfere on complaint, 984, note 6.

Abuse of negro passenger by drunken men, 984, note 6.

Shooting of boy by drunken passengers who had previously been shooting off dynamite sticks, 984, note 6.

Drunken passengers compelling negro to dance at point of revolver, 984, note 6.

[REFERENCES ARE TO SECTIONS.]

INTOXICATED PERSONS—con.

If carrier has knowledge that passenger is intoxicated, the carrier should use special care to protect him from injury, 994.

If intoxicated passenger is left by brakeman in exposed place, carrier guilty of negligence, 994.

Carrier liable if intoxicated man ejected at dangerous place, 994.

But when carrier has done his full duty in ejection of drunken passenger, not liable if passenger wanders back on track and is killed, 994, 1083.

Same degree of care required of, as is required of passenger who is sober, 1230.

Where accepted by carrier with knowledge that he is helpless to avoid danger, carrier liable if he is negligently carried past station, and he succumbs to exposure, 1083, note 15.

INTOXICATION—

Accident through intoxication of driver of coach, 959.

Gross misconduct to employ intemperate servant, 961.

Intemperate habits of servant with knowledge of carrier may be shown in aggravation of damages, 961.

Does not *per se* constitute contributory negligence, 1230.

Intoxicated person, same degree of care required of, as is required of passenger who is sober, 1230.

No bar to a recovery where it does not contribute to injury, 1230.

Whether proximate cause of injury, question for jury, 1230.

Where carrier accepts person as passenger with knowledge that he is so intoxicated as to be physically and mentally incapable of avoiding danger, question of contributory negligence cannot arise, 1230.

INUNDATION—

Whether loss by, is act of God, 271, 282.

INVOICE—

Not evidence of title to goods, 186.

JACK—

Limitation of value as to horse or mule does not apply to jack shipped under contract, 467, note 2.

Care of jack during transportation, 634, note 37.

JANITRESS—

Effect of delivery by carrier to janitress, 674, note 31.

[REFERENCES ARE TO SECTIONS.]

JERKS AND JARS—

Carrier liable for jerks and jars in management of train containing live stock, 639.

Passenger carrier must exercise high degree of care to avoid sudden jerks and jars, 924.

Negligence in him to make a running switch, 924.

Carrier liable for injuries resulting from jerks and jars resulting from use of too small an engine, 924.

Carrier liable for injuries to passengers due to extraordinary jerks and jars, 1111.

Rule as to freight trains, 1111.

Unusual jerks and jars *prima facie* evidence of negligence, 1414.

JETTISON—

Liability of carrier for jettison of cargo on account of top heaviness of vessel, 352.

When jettison is a peril of the sea, 485.

Carrier liable for loss of goods stowed on deck without consent of owner, though necessarily jettisoned in storm, 603.

Owner may be entitled to contribution for loss by jettison when lumber carried on deck by custom of particular trade, 605.

JEWELRY—

Carriage of jewelry as ordinary freight, 434.

When baggage, 1246, 1249.

JOINT LIABILITY (See PARTNERSHIP; ASSOCIATION; CONNECTING CARRIERS)—

When concurrent negligence of two carriers creates a joint liability, 917.

JOINT RATE (See THROUGH RATE)—

Is not a basis for local rate under Interstate Commerce Act, 566.

JUDGMENT—

In favor of carrier for full value of goods, bar to action by general owner, 780.

Carrier recovering, trustee for general owner, 780.

Satisfaction of, passes title to party against whom rendered, 780.

In trespass or trover against bailor, damages limited to special interest, 782.

KEROSENE—

Stowing flour near, 606, note 30.

[REFERENCES ARE TO SECTIONS.]

KICKING—

Carrier of animal does not warrant against consequences of its kicking, 336, 337, 338.

Carrier must take precautions against kicking, however, 638.

KIN—

When existence of, must be shown in actions for death by wrongful act, 1394.

Pecuniary condition of next of kin immaterial, 1397, note 28.

KNOWLEDGE—

Effect of shipper's knowledge of negligent stowage, 602, note 18.

Knowledge by carrier of shipper's omission to furnish caretaker is essential to charge him with liability, 642.

LABOR DAY—

Delivery of goods upon, 692, note 21.

When charterer liable for demurrage on, 837, note 55.

LACES—

When baggage, 1245, 1246.

LACHES—

Seizure of goods under legal process to be an excuse for non-delivery must not have been brought about by laches of carrier, 745.

Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

LADIES' CAR—

Exclusion of men from, 972, note 29.

LAMBS—

Delay in shipment of, 652, note 20.

LANDSLIDE—

Whether loss by landslide is an act of God, 284.

LATENT DEFECT—

Section two of Harter Act does not forbid exemption from liability in bill of lading for latent defect in refrigerating apparatus, 362, note 40.

Liability of vessel for latent defects, 364.

Exemption clause in bill of lading against liability for latent defects, effect of, 365, note 48, 464.

Liability of passenger carrier for latent defects in vehicle, '903-905.

For latent defect in track, 951.

Liability of vessel for latent defects, 953, note 8.

[REFERENCES ARE TO SECTIONS.]

LAW—

Governing validity and interpretation of contracts, 199-224.

LAY DAYS—

What are counted as, 837.

Do not begin to run until notice of vessel's readiness is given, 848.

LEAKAGE—

Liability of private carrier for hire for leakage from cask, 38.

When common carrier liable for, 163, 631, 632.

When a peril of the sea, 489, note 60, 492, note 70.

Meaning of, 489, note 60.

Carrier as warehouseman not liable for loss from leakage through a defect in a cask, 685.

Carrier may be a loser in the amount of freight he can demand through leakage, 813.

LEAKS—

Presumption of seaworthiness exists when leaks soon happen in ordinary weather, 370.

Leaking decks or hatches may make vessel unseaworthy, 371, 390, note 45.

LEASE—

Of railroads, effect on liability of company, 918, 915, note 38.

LEGAL HOLIDAY—

Delivery of goods upon, 692.

LEGAL IMPORT—

Of bill of lading, not alterable by parol, 169.

LEGAL PROCESS—

Carrier excused for non-delivery when goods taken from him by legal process, 738-740.

Even when seized under process against stranger, 739, 740.

When seized under process against stranger, no protection to carrier in Massachusetts, 741.

Process to protect must at least be fair upon its face, 742.

Carrier must give prompt notice to consignor or owner of proceedings against goods, 743.

Carrier by water must defend suit till owner notified, 744.

Seizure must not have been brought about by laches or connivance of carrier, 745.

Effect of garnishment or trustee process, 746-748.

[REFERENCES ARE TO SECTIONS.]

LESSEE—

Liability of railroad company for neglect of, 918, 915, note 38.

LETTER—

Liability of railroad company for lost letter, 91.

Delivery by carrier to swindler through forged letter, 669.

Delivery by carrier while holding as warehouseman to swindler through forged letter, 683.

LEX FORI (See CONFLICT OF LAWS)—

LEX LOCI (See CONFLICT OF LAWS)—

LIABILITY OF CARRIER—

The liability imposed upon him by law, 265.

May assume greater liability by express contract, 266, 267.

Exceptions to liability by law, see ACT OF GOD; PUBLIC AUTHORITY; INTERMEDDLING; INHERENT NATURE; LIVE ANIMALS.

Exceptions to liability by contract, see LIMITATION OF LIABILITY BY CONTRACT; CONTRACT; BILL OF LADING.

General liability in execution of undertaking, see COMMON CARRIER; TRANSPORTATION; NEGLIGENCE; DAMAGES; ACTIONS.

“LICENSED BUS”—

Owner of, not necessarily a common carrier, 68.

LIEN—

Whether private carrier for hire has lien, 46.

Warehouseman and wharfingers, 46.

Existence of carrier's unpaid lien for freight raises strong presumption that he holds as carrier and not as agent for buyer, 769, note 28.

Lien for freight charges confers no power to sell to satisfy charges and expenses, 786.

When goods stored for charges by carrier with another warehouseman, goods subject to lien of latter as well as to that of carrier, 786.

When carrier compelled by emergency to employ another carrier, latter has lien on goods for freight, 823.

Lien of substituted carrier co-extensive with that of first carrier, 823, note 22.

No lien at common law for demurrage, 856.

Otherwise by maritime law, 856.

Lien may be waived, 856.

Lien of railroad company on goods to secure charges in the nature of demurrage, 862.

Lien for freight and charges, 864.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

Lien nothing more than a right to retain possession of goods until carrier's charges have been paid or tendered, 864.

Owner has no right to demand possession of goods until he has paid or tendered payment for carrier's service and advances, 864.

So, in general, carrier has no right to freight until goods tendered to consignee, 864.

Carrier must be in position to demand freight before lien attaches, 864, note 14.

Carriers by water have lien for their charges the same as carriers by land, 864, note 14.

But carrier by water cannot detain goods on board ship where consignee would have no opportunity of examining their condition, 864, note 14.

Rights of respective owners of a ship and cargo are reciprocal, 864, note 14.

Right to a lien for freight gives a right to a lien upon the ship for due performance of contract for safe carriage and delivery, 864, note 14.

Lien attaches to goods for whole freight carrier would earn as soon as they are delivered to carrier, 865, note 15.

Lien of carrier usually a specific one, 865.

Confined to charges and advances upon particular goods upon which it is claimed, 865.

No right to retain goods for general balance in absence of contract or usage justifying, 865.

But the rule is otherwise where the same vendor, under a single contract of sale, ships several consignments of goods to the same vendee, each shipment embracing several carloads, 865, note 16.

And carriers may by express agreement or long established usage of particular localities, or of particular classes of those engaged in that business, retain goods for general balances, 865.

Lien extends only to charge as carrier, and not as warehouseman, 866.

Extends to expenses necessarily incurred in reconditioning insufficient bags according to terms of bill of lading, 866, note 18.

But carrier cannot hold goods for debts due himself not connected with the carriage, 866, note 18.

Nor where goods are consigned generally to consignee, for general freight balance against consignor, 866, note 18.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

Lien includes legal import duties paid either to government directly or to connecting carrier, 866.

Does not include expenses for warehousing the goods, 866.

Nor to damages arising from a breach of a collateral contract, 866.

In England, does not include port charges, 866.

Carrier cannot refuse to deliver until payment of charges for a former shipment is made, 866, note 22.

Lien extends to advances made by preceding carriers, 867.

Final carrier may refuse to deliver until such advances have been paid unless shown by the bill of lading, or otherwise, to have been prepaid, 867.

Final carrier need not investigate merit of prior charges which are apparently just, 867, note 24.

If charges are apparently regular, right of final carrier not altered by the mistake or omission of a previous independent carrier, 867, note 24.

Effect of shipping goods "released" or prepaid without notice to last carrier, 867, note 24.

Carrier, however, not authorized to pay every extortionate charge that preceding carriers may see fit to impose upon the goods, 867, note 24.

Connecting carrier need not delay receiving the goods until original contract with owner can be investigated, 867, note 24.

Connecting carrier not liable to preceding carrier for freight charges if goods are destroyed on wharf preparatory to delivery to him, 867, note 24.

Carrier should examine bill of lading, if one accompanies the goods to see if freight has been prepaid, 867.

If bill of lading silent, and carrier has no information from other sources, he is justified in advancing freight and will be entitled to lien therefor, 867.

Effect of statement in bill of lading, known to connecting carrier to be erroneous, that freight charges had been prepaid on latter's rights against *bona fide* transferee of bill of lading, 867.

If carrier contracting to carry goods employ another carrier, latter will be entitled to a lien, 867.

Unless first carrier has been paid for the service, 867.

Or unless first carrier had no authority, express or implied, to forward goods beyond his own line, 867.

Lien of last carrier not affected by fact that previous carrier had been in fault by reason of damage to the goods, 867.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

Mistakes or errors made by first carrier, or any intermediate carrier, in giving directions for forwarding goods, will not affect final carrier's right of lien, 867, note 31.

If goods carried to wrong destination, or over wrong route, by fault of shipper or his agent, final carrier entitled to his lien, 867.

Rule where initial carrier, without authority, guarantees a lower through rate to the shipper than the regular rate, 867.

In such case, right of final carrier to lien for prior charges, would depend on whether he had actually paid them, 867.

When lien on sub-freight may be exercised by shipowner, 868.

Unconditional delivery by carrier discharges lien, 869.

Fact that consignee is agent of consignor, and agrees to hold goods until charges are paid, does not alter rule, 869.

Carrier may deliver, and reserve right to proceed against goods for his freight, 869.

Or such an understanding may be inferred from plain local usage of particular port, 869.

If master demands freight immediately on completing the discharge notice of non-abandonment of lien served at once will preserve it, 869, note 37.

Intention of carrier to retain lien after delivery of goods not assented to by consignee, insufficient unless supported by local custom or usage to that effect, 869.

Lien waived when carrier bases his refusal to deliver on other grounds, 869.

Lien not lost where delivery made to one to whom consignee has made an assignment for the benefit of his creditors, 869.

Lien in such case follows the fund realized on the property delivered, 869.

When part of goods delivered, carrier may retain balance till freight on whole consignment paid, 870.

Partial delivery will not be taken as constructive delivery of whole, or as waiver of lien, unless parties so intended, 870.

Intention of parties a question of fact, 870, note 42.

Carrier may demand security for entire freight before delivering any portion of goods, 870.

Consignee refusing, carrier may store at his expense, 870.

Carrier cannot insist on payment of freight by parcels, 870.

Rule different in England where carrier may require freight to be paid upon each parcel as delivered, 870, note 43.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

When delivery procured by trick or fraud of consignee, lien for freight not discharged, 871.

Or when promise to pay on delivery, which consignee fails to do, 871.

In such case, carrier may retake possession by writ of replevin, 871.

Lien of carrier has precedence over claim of general creditor of owner or consignee, 872.

Or of pledgee who has procured the property to be transported and stored, 872, note 46.

But lien inferior to that of mortgagee of whose rights carrier had both constructive and actual knowledge before it accepted goods for transportation, 872, note 46.

Creditor of owner or consignee levying on goods in possession of carrier must pay freight, 872.

In which case, substituted to lien of carrier, 872.

Lien of carrier superior to right of *stoppage in transitu*, 872.

Even after part delivery carrier may maintain his lien for whole charges on balance undelivered, as against vendor's right of *stoppage in transitu*, 872.

But lien for general balance, good as between carrier and consignee, cannot prevail against vendor's right of *stoppage*, 872.

Conditional vendor of goods, who authorizes vendee to ship and use them, estopped from disputing carrier's lien for freight, 873.

Lien lost where carrier is liable for damages to goods equal to or exceeding the freight charges, 874.

Lien of carrier may be waived without express agreement to that effect, 875.

Such agreement may be inferred from terms of payment agreed upon, 875.

Lien waived where time for payment postponed to future date beyond time for delivery, 875.

Waived by implication where provision in bill of lading inconsistent with, 875.

Such agreement must be express or implication clear, 875.

Waiver by taking acceptance payable after delivery, 876.

But presumption exists in favor of the existence of the lien, 877.

Terms of special agreement to constitute a waiver must be absolutely inconsistent with retention of goods, 877.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

If delivery can be rightfully postponed beyond date for payment of freight, lien not waived, 877.

Particular words in bill of lading construed in favor of existence of lien, 878.

Meaning of "discharge" of vessel, 878.

Effect of failure of freighter where notes given for freight for accommodation of carrier, 878.

Extension of credit no waiver of lien when credit is given on condition that freighter shall furnish security for the payment, or deliver to the carrier bills and notes for the amount, unless condition is fulfilled according to the agreement, 879.

Consignee failing to pay freight, carrier may store at his expense, when, 880.

In such case warehouseman holds for carrier, 880.

Deposit may be made in name of carrier, 880.

Such deposit neither a conversion of the goods nor a discharge of the lien, 880.

Warehouseman liable in such case to carrier as for a conversion of them, and for full amount of his freight, if he delivers the goods without payment of freight, 880.

While holding goods in pursuance of his lien, carrier not an insurer, 881.

Bound to use reasonable care in respect of goods, 881.

Whether carrier has a lien on goods wrongfully shipped by one who is not owner—

In England, lien attaches in favor of carrier and innkeeper, in such case, 882.

How right of carrier compares with that of innkeeper, 883.

In America, rule different as to carriers, 884.

Rights of connecting road no better in this respect than those of initial carrier, 884.

But lien exists where goods are received from one clothed with apparent authority by owner, 885.

Connecting carrier not to be deprived of his lien because first carrier, by mistake or otherwise, sends goods to wrong place or by wrong route, 885.

Unless he has good reason to know that goods were delivered to him in violation of owner's instruction, 885.

Property of United States government subject to lien like that of private person, 886.

[REFERENCES ARE TO SECTIONS.]

LIEN—con.

Lien discharged by tender—

Lien is discharged by a tender of performance, when refused by bailee, 887.

Lien not assignable—

Personal privilege, and does not pass by sale or pledge, 888.

Carrier cannot sell goods for his charges—

Sale by carrier without authority to enforce lien is a conversion, 889.

If statute exists, sale must be conducted in accordance with, and upon notice provided by statute, 889.

Carrier has, on baggage to secure price of carriage, 1303.

Wearing apparel on person of passenger, carrier has no lien on, to secure price of carriage, 1303.

Carrier has no right to forcibly take articles from possession of passenger to secure price of carriage, 1303.

Carrier has no right to detain passenger to compel payment of fare, 1302.

LIGHT—

Duty to supply vehicles with, 922.

Platforms and stations must be lighted, 936.

Lights should be maintained for reasonable time before and after departure of trains, 936.

Character of lights required depends on character of station, 936.

Fact that train is special train no excuse for not having platform properly lighted, 936.

Carrier liable if through failure to provide proper lights passenger falls over hampers, switch handles or other obstructions and is injured, 936.

Railroad company not bound to light station for express company's agent who comes to baggage room several hours before express train is due, 936, note 12.

Whether evidence as to lighting of station before or after the action is admissible, 936, note 12.

Effect of delay of train on lighting of platform, 936, note 18.

Person coming to station after last train is gone cannot recover for injuries sustained by extinguishment of lights, 936.

Company not liable where person recklessly walks off in darkness caused by temporary removal of lights, 936.

Nor where persons injured when all the light is furnished that experience has shown to be necessary, 936.

[REFERENCES ARE TO SECTIONS.]

LIGHT—con.

Failure to light station not proximate cause of assault on female passenger by third person while passenger seated there alone, 936.

Liability of intersecting railroads for maintenance and lighting of common depots or platforms, 938.

LIGHTER—

Taking goods on lighter may be good delivery to ship, 120.

Use of lighters under section one of Harter Act, 350, 360, note 35.

When loss of cattle from lighter is a peril of the sea, 489.

LIGHTERMEN—

When common carriers, 65, 70.

Duty as to fitness of vessel, 497.

LIGHTNING—

Whether loss by, is act of God, 271.

LIMBS—

Passenger projecting, from car window, chargeable with contributory negligence as a matter of law, 1209.

This view supported by weight of authority, 1209, 1210.

Extent of protrusion immaterial, 1209.

Passenger projecting from car window, view that question of passenger's contributory negligence is for jury, 1211, 1212, 1213.

Passenger projecting, from car window, no defense to carrier where it does not contribute to injury, 1214.

LIMITATION OF LIABILITY BY CONTRACT—*By private carrier for hire—*

May protect himself by contract from all losses occasioned by negligence or misfeasance, 14, 40.

But not for losses occasioned by his fraud or want of good faith, 40, 45.

By carrier of goods—

Liability of carrier usually limited by contract, 153.

Parol modifications of, 167, 174.

What law governs as to validity of limitations of liability, 212-224.

Under Interstate Commerce Act initial carrier cannot restrict liability to his own line, 235.

Extent to which carrier may limit his liability under contract of through carriage, 240.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Stipulations in bills of lading contrary to section one of Harter Act are void, 349. See Harter Act.

Exemption clauses in bills of lading strictly construed under Harter Act, 365.

Goods now usually shipped under contract for limited liability, 388.

Stipulations in bills of lading binding, if such can lawfully be agreed upon, 388.

Rigor of common-law rule thereby relaxed, 389.

By common law in England public notice sufficient without express contract, 390-392.

Changed by Carrier's Act, 393-395.

Under Carrier's Act public notice insufficient, 395.

Carrier might limit liability by contract or notice to customer, 395.

Conditions on ticket delivered to shipper sufficient whether read by him or not, 395.

Modified in 1854 by Railway and Canal Traffic Act, 396.

Under latter act, railway and canal companies may limit liability by contract signed by shipper if reasonable and just, 397.

Under either act may stipulate against liability for loss by negligence but not by felonious act, 397.

But language to relieve from negligence must be explicit, 398.

In America, carrier cannot limit liability by public notice or notice to bailor, 399, 406.

May by special contract, 401.

Contract must be express, 402.

Such limitations result from shipper's waiver of common-law liability, 403.

But shipper must be allowed real freedom of choice between restricted or common-law liability, 404.

Actual offer of option unnecessary, 404.

Sufficient if it would have been given on demand, 404.

Limitation of liability by carrier prohibited in some states, 405.

When shipper accepts bill of lading or receipt containing conditions, special contract implied, 406, 407.

Acceptance of carrier's receipt creates a contract according to its terms between him and the shipper, 408.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Failure to read no defense if no fraud practiced, 408.

Burden of proof is on shipper to show that unfair means were resorted to, 408, note 39.

Shipper presumed by accepting receipt to have assented to its conditions, 409.

Some courts, however, hold mere acceptance insufficient, 410.

Rule in Illinois, 410.

In absence of statute, no particular form of contract limiting carrier's liability is necessary, 411.

Contract need not be in writing, 411.

Unsigned bill of lading may be evidence of the contract actually made, 411, note 3.

Written contract limiting liability may be subsequently modified, enlarged, waived or discharged altogether by parol, 412.

But written contract not providing for a limitation of liability cannot be varied by proof of a custom to vary the contract in such respect, 412, note 5.

Effect of carrier's omission to sign, 412.

Statutory requirements as to signatures, 413.

Distinction between notices limiting common-law liability and those restricting business to particular routes, classes of goods, etc., except on certain conditions, 414.

Notices of latter class binding on shipper, 414.

Terms of limitation must be contained in receipt or written or printed legibly upon its face, 415.

Any attempt at imposition vitiates, if overlooked, 415.

If printed on back of receipt, no evidence in favor of carrier, 415.

Or if limitation is contained in a separate contract, separately signed, 415, note 11.

Or if covered so as to be unintelligible, 415, note 13.

Or if impressed in red ink at right angles to text of paper, 415, note 12.

Or where limitation contained in baggage check handed to passenger in dimly lighted car, 415.

Receipt must be accepted by shipper at time of shipment, 416.

But shipper may afterwards, by conduct amounting to a ratification, adopt the limitations in a contract of shipment, 416.

How rule affected by custom, 416.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods*—con.

Parol agreement acted upon cannot be limited by receipt, subsequently delivered, 417.

Passenger's rights and carrier's liability as to baggage are fixed when his ticket is bought, 417, note 21.

Extent to which carrier may limit his liability is almost unlimited, 418.

But not against fraud or felony of himself or servants, 418.

Nor in America, against negligence of self or servants, 418.

Carrier may stipulate for exemption from liability for certain losses in carriage of live stock, such as suffocation, heating, and the like, 419.

Consideration for such contracts usually found in reduced rates, 419.

Carrier may stipulate for exemption in case of loss by fire, 420.

But he is liable if he negligently exposes the goods to danger, 420.

Carrier may stipulate for exemption in case of loss caused by strikes, mobs, etc., 421.

Or from thieves, robbers, etc., 422.

Carrier may stipulate for exemption where goods of a dangerous character are accepted for carriage, 423.

Carrier may stipulate for liability of warehouseman while goods are awaiting further conveyance, 424.

If injury or loss occurs from cause for which carrier is not responsible, contract founded on adequate consideration limiting amount recoverable is valid, 425.

Amount must be fixed with regard to real value of goods, 425.

Otherwise, if loss occurs through carrier's negligence, owner may recover to full extent of actual loss, 425.

Contracts that goods are of a certain value, or that their value does not exceed a certain sum, and that the carrier's liability shall not exceed that valuation, are valid, 426.

Even where loss occurs through carrier's negligence, 426.

Valuation agreement must be *bona fide* and reasonable, 427.

If owner deliberately places value on goods at carrier's request, he will be estopped from afterwards asserting that their value was more, 428.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Where valuation written on back of contract it will be considered as notice only, 428.

Ordinarily parol evidence inadmissible to vary express valuation, 428.

But parol evidence is admissible where valuation is ambiguous, or on question of owner's assent, 428.

Construction of doubtful valuation will be against carrier, 428.

Measure of recovery where the loss is only partial, 429.

Conflict of authority on contracts limiting recovery to value of goods at time and place of shipment, 430.

Contracts limiting liability to fixed amount without regard to value of no avail in case of negligence of carrier or his servants, 431.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432.

The same is true if carrier is guilty of a conversion, 432.

Carrier may stipulate in receipt that unless informed of value of goods he will be liable only to limited amount, 433.

Shipper should inform carrier of value of goods and compensate him accordingly, 433, 434.

But knowledge of the character of the goods or previous course of dealing may waive requirement that, unless value of goods is stated, carrier will only be liable to limited amount, 435.

By English Land Carrier's Act liability in some cases limited to £10, 436.

Declaration of value made by shipper conclusive against him under that act, 436.

Shipper is bound to disclose value of goods when there is a special contract to that effect, 437.

Or when shipper has notice that carrier will be liable only to a limited amount unless value is disclosed, 437, 438.

Notice under English Land Carrier's Act, 439, 440.

Some American cases hold notice from previous course of dealing valid, 441.

Conditions limiting time within which claims shall be made for loss are usually valid, 442.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Whether action *in rem* against a vessel or *in personam* against the owner is immaterial, 442, note 40.

Condition limiting time within which claim shall be made must be reasonable, 443.

Whether condition was reasonable is ordinarily a question for the jury, 443.

Carrier may waive benefit of such conditions, 444.

What constitutes such a waiver, 444.

Inducing owner to delay presentment of notice, 444.

Acting on verbal notice, 444, note 6.

Going to trial on other defenses, 444, note 6.

Treating claim as pending and rejecting it on other grounds, 444, note 6.

Accepting notices defective in form, 444.

Failure to give necessary information for presentment, 444.

But waiver on prior occasions will not amount to waiver in later case, 444, note 6.

Nor is there a waiver when it is expressly provided that no agent shall have power to waive, 444.

Condition that claim for damages must be filed in certain time will be construed as referring only to claims for injuries to goods themselves, and not to claims for damages from delay, 445.

Effect of failure to make delivery at all, 445.

Condition no defense to action for misdelivery where carrier falsely asserted he still continued to hold the goods, 445, note 14.

So failure to present a notice of claim within time specified no defense where carrier has been guilty of a conversion, 445.

But stipulation is valid although carrier is holding goods as warehouseman, 446.

Conflict of authority as to question on whom rests the burden of proof, 447.

Some courts hold burden of proof is on owner of goods to show he has complied with the condition, 447.

Some courts hold burden of proof is on carrier to show condition was reasonable and owner's failure to comply with it, 447.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Rule in Illinois, 447.

Carrier may limit time within which suit shall be commenced, 448.

Rule in Kentucky, 448.

Burden of proving loss was within exceptions in contract is on carrier, 449.

But where loss occurs through excepted cause, burden of proving negligence is on owner of goods, 449.

In America, weight of authority against permitting carriers to exonerate themselves from consequences of negligence by contract, 450.

All courts agree that if exemption from negligence be permitted, exemption must be express and will be construed against carrier, 450.

The rule of the United States Supreme Court, 452.

Contrary rule prevails in New York, 454.

Rule in Illinois, 455.

Stipulation as to amount of proof required amounts to limitation as to negligence and is void, 456.

Owner bound to limitation by acceptance of receipt by agent, 457.

Authority of carman to bind owner, 457.

Authority of drover to bind owner, 457.

Authority of drayman to bind owner, 457, note 9.

Contract not affected by secret limitations of agents' authority, 457, note 9.

Initial carrier, as agent of owner, has authority to accept reasonable terms of connecting carrier, 458.

But owner not bound by limitation where carrier has notice that authority of agent is restricted, 459.

Although he may adopt the act of his agent, 459.

Carrier is bound by such contracts made by his agent as public have a right to assume, from nature of employment, agent has authority to make, 460.

In England, local or station agent may bind carrier to performance of contract beyond scope of his legal duties, 461.

Public has right to assume that agent of carrier has authority to bind him within scope of his business, 462.

Station agent has implied power to make provision for clearance of customs duties, 462, note 19.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

So he has implied power to agree to furnish reasonable number of cars for live stock by a certain date, 462, note 19.

Or that person in charge of animals may ride in stock car, 462.

Verbal contract of shipment entered into by station agent will ordinarily bind carrier, 462, note 19.

Agents of each associated road have authority to bind other road, 462, note 19.

Effect of circulars sent by carrier to shipper on authority of agent, 462, note 19.

Power of agent of carrier to agree that goods shall be sent by particular boat, 462.

Local usage, unknown to shipper, restricting power of carrier's agents, cannot affect his rights, 462.

In America, carrier's agent may agree to deliver beyond carrier's terminus, 462.

But agent cannot agree to forward freight by passenger train, 462.

Contract of exemption must be so explicit as to leave no doubt as to its meaning, 463.

General language not sufficient, 463.

Meaning of owner's risk, 463.

Contract against fault of pilot, master or mariners does not include carelessness of mate, 463.

When contract limiting liability depends on notice by carrier, or terms and conditions of receipt, ambiguities solved against carrier, 464.

Contract that carrier shall have benefit of insurance on goods construed to cover loss or damage to goods themselves, and not to damage from delay, 464, note 34.

So provision that claim should be filed within certain time does not apply to damages from delay, 464, note 34.

Where carrier gives two notices he is bound by one least beneficial to himself, 464.

When particular risks specifically excepted, followed by more comprehensive terms, former control, 465.

Construction of specific terms not altered to release carrier, 466, 467.

Ambiguous words construed against carrier, 468, 469.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Limitation against negligence of carrier's servants will not extend to personal negligence of carrier, 467, note 2.

When first carrier bound by contract or law to carry to destination, succeeding carriers entitled to benefit of protection afforded by his contract, 470-472.

Not so, when first carrier mere forwarding agent beyond his own route, 471, 472.

Limitation inures to benefit of connecting carrier only when contract for through carriage exists, 472, 473.

Connecting carrier by taking new and different contract waives benefits of stipulations in first contract, 472, note 10.

By what law limitations of liability are to be construed, 474.

Consideration necessary to uphold such contract, 475.

Recital that rate is less than usual rate not conclusive, 475.

Contract must have a fair construction, 476.

Carrier liable notwithstanding exemption if the loss be the result of his negligence, 477.

Or if loss occasioned by his misfeasance, 478.

Or, though exemption be for losses resulting from delay, if delay is occasioned by negligence, 479.

Or if he departs from the stipulated method of transportation, 480.

Or if he is guilty of a conversion of the goods, 478, note 23.

Or if he discriminates against a shipper in forwarding his goods, 480.

But notorious usage may determine whether there has been a departure from contract, 480.

Sending goods by another route in order to mitigate damages, 480.

Exceptions to liability in bills of lading of carriers by water, 481.

Antiquity of exception against perils of the sea, 481.

Extended to river and other water navigation, 481.

Importance of this exception, 482.

Perils of the sea not synonymous with the act of God or king's enemies, 483.

When collision between vessels a peril of the sea, 483.

Casualty avoidable by reasonable skill and diligence, not within exception, 483-487.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By carrier of goods—con.*

Mistake of master as to signal lights, 484.

When jettison is a peril of the sea, 485.

Hidden obstructions, 486.

Breaking of rope, 487.

Inrush of water through explosion of blasting cap, 488.

Rats gnawing hole in water-pipe, 488.

Ventilators carried away by gale, 488.

Negligent caulking of hatches, 488, note 56.

Storm breaking foreboom and parting anchors from chain, 488, note 56.

When loss of logs is peril of sea, 488.

Giving way of stanchion, 488.

Losses by fire not within exception, even where motive power furnished by fire, 489.

Explosion of boiler not a peril of the sea, 489.

Escape of steam, 489.

When loss of cattle is a peril of the sea, 489.

When motion of vessel is a peril of the sea, 490, note 65.

Damage from coal dust not a peril of the sea, 490, note 65.

Injury to vessel from rats, 490, note 65.

Shipping water, 490, note 65.

Breaking tiller rope, 490, note 65.

Desertion of seamen, 490, note 65.

Burden of proof on carrier to show loss to be within exemption, 490, note 65.

Carrier liable, notwithstanding exception against perils of the seas, for loss from theft, embezzlement, robbery, mobs, etc., other than pirates, 491.

Carrier liable, notwithstanding exception against perils of the sea, when loss caused by negligence, 492.

Where master neglects usual precautions, 492, note 70.

When defect in carrier's vehicle can be traced to his negligence, he cannot protect himself by contract, 497.

Effect of section two of Interstate Commerce Act on limitations on the value of goods in bills of lading, 548.

By passenger carrier—

Passenger's rights and carrier's liability as to baggage are fixed when his ticket is bought, 417, note 21.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By passenger carrier—con.*

Passenger carrier cannot limit his liability by notice or regulation, 1069.

Conclusiveness of acceptance by passenger of contract ticket, 1069.

Good faith required on part of carrier, 1070.

Presumption that passenger never assented to condition where any device resorted to to conceal it from him, 1070.

When limitation communicated to passenger for first time after he has paid his fare, no assent presumed, 1070, note 45.

Effect of failure to read limitation of liability for loss of baggage, 1070, note 45.

When limitation inures to benefit of connecting carrier, 1071.

Passenger carrier cannot contract against consequences of his own negligence, 1072.

Rule in Illinois, 1072, note 47.

Exemption against responsibility for its own or servant's negligence, provided it has used due diligence to make vessel seaworthy, is void, 1072, note 47.

Limitations of liability against carrier's or its agent's negligence in tickets for passage on freight trains, void, 1072, note 47.

Actual payment of cash fare not necessary to render stipulations against liability for negligence void, 1073.

Such stipulations void, where valuable consideration exists, even though passenger carried on "drover's" or "employee's" pass or any other ticket purporting to be a "free" pass, 1073.

Such passes not gratuitous, 1073.

Such stipulations sustained as to express messengers, sleeping car porters, and news agents, 1073.

No distinction as to degree of negligence, 1074.

Rule where free passes are issued on condition of no liability, 1075.

By statute in some states, passenger can recover for carrier's negligence, even though riding on free pass conditioned against liability, 1075.

In majority of states, carrier may contract against liability for negligence on free pass, 1075.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—By passenger carrier—con.

Immaterial whether person reads conditions on pass or not, 1075.

Rule in case of infants riding on free pass, 1075.

Stipulations against liability for negligence on free pass must be express, 1075.

Carrier may enter into contract of indemnity with insurance company, 1076.

In America, liability of carrier for loss of baggage cannot be limited by public notice, 399.

Contracts limiting liability as to baggage, 1297.

In general, no distinction between contracts affecting baggage and those affecting goods, 1297.

Limitation, terms of, on baggage checks, 1298.

Limitation, terms of, distinction between those on baggage checks and those in shipping contracts, 1298.

Limitation, terms of, on baggage checks, usually not binding on passenger unless assented to, 1298.

Limitation, terms of, on passenger tickets, 1299.

Limitation, terms of, on passenger tickets, binding on passenger if ticket imports special contract, 1299. See, also, 1069.

But to be binding on passenger, such terms must properly form a part of contract embodied in ticket, 1299.

Limitation, terms of, on passenger ticket, not importing special contract, not binding on passenger unless assented to by him, 1299.

Limitation, terms of, on passenger ticket, no evidence in carrier's favor of a special contract when written or printed on back of ticket, 1299. See, also, 1070.

Limitation, terms of, on passenger ticket, not binding on passenger when misled by statements of carrier's agent, 1299, note 14. See, also, 1070.

Limitation, terms of, on passenger ticket, to avail carrier, must be printed in language which passenger understands, 1299, note 14.

Limitation, terms of, on passenger ticket, to avail carrier, must not be obscurely printed on ticket, 1299, note 14. See, also, 1070.

[REFERENCES ARE TO SECTIONS.]

LIMITATION OF LIABILITY BY CONTRACT—*By passenger carrier—con.*

Limitation, terms of, on passenger ticket as to amount of baggage, valid when reasonable, 1299, note 14.

Limitation, terms of, on passenger ticket as to amount of baggage, not applicable to baggage upon which excess charges have been paid, 1299, note 14.

Free-pass, terms of limitation in, relieving carrier from all liability for loss of baggage, held not unreasonable, 1299, note 14.

Free baggage, amount of, regulated by section twenty-two of Interstate Commerce Act, 523.

Contracts of, by sleeping-car companies, 1132.

Railroad company cannot limit its common law liability for negligence by any arrangement with sleeping-car company, 1135.

LIMITATION OF LIABILITY BY STATUTE (See STATUTES; HARTER ACT)—

Federal statutes, 344.

LIMITATION OF TIME—

Common carrier may show limitation of time for commencing suit, 448.

On passenger tickets, 1043, *et seq.*

Effect of limitation as to time of bringing suit in actions for death by wrongful act, 1396.

LIMITED TRAINS—

May be run and higher rate charged, 1058.

LIQUID CARGO—

Stowage of, 355.

LIVE ANIMALS—

Liability of express company when carrying live stock, 82, note 1.

Liability of railroad company for loss of dog carried in violation of its rules, 91.

Hogs in private pens, not loaded, accounted or receipted for, are not delivered to carrier so as to impose duties of common carrier, 105.

When placing of live stock in carrier's pens or yards will impose duties of common carrier, 114.

Duty of initial carrier when transportation refused by connecting carrier, 131.

Effect of agreement between connecting carriers to deliver to stockyards company to make transfer, 136.

[REFERENCES ARE TO SECTIONS.]

LIVE ANIMALS—con.

Liability of carrier for damage to live stock owing to inability of carrier to supply stock with sufficient water, the carrier having had full knowledge of drought then prevailing, 151, note 19.

Escape of live animals from car during transportation, 333, note 7.

Where owner undertakes loading, he cannot recover for injury due to negligence in loading, 333, note 10.

Carrier not liable for natural death of animals, 334.

Carrier not liable for carriage of, as in case of inanimate freight, 335.

Difference in liability based on inherent nature, 336.

Carrier does not warrant against inherent nature of animal, as its tendency to unruliness, restiveness, fright, viciousness, kicking, goring, etc., 336, 337, 338.

But carrier liable as insurer of animals except for losses caused by their peculiar nature, 339.

Cases holding contrary view, 340.

Carrier of animals is common carrier and not special agent of owner, 341.

Though injury caused by peculiar nature of the animals, carrier not excused if he has been negligent, 342.

Carrier liable for injuries to animals through negligent exposure to cold, 342, note 1.

Duty of shipper to disclose peculiarities affecting risk, 343.

Stowage of cattle on vessel, 353, note 24.

Liability of carrier for injury to horses by being put into an insufficient truck, 397, note 16.

Carriage of horses at owner's risk, 397, note 16.

Carrier may stipulate for exemption from liability for certain losses in carriage of live stock, such as suffocation, heating, and the like, 419.

When shipper is bound to disclose value of the animals shipped, 437, 438.

Conditions limiting time within which claim shall be made for loss or injuries to live stock, 442, *et seq.*

Station agent has implied power to agree to furnish reasonable number of cars for live stock by certain date, 462, note 19.

Or that person in charge of animals may ride in stock car, 462.

Injury to horses by bottom of car giving way, 465.

[REFERENCES ARE TO SECTIONS.]

LIVE ANIMALS—con.

Limitation of value as to horse or mule does not apply to jack shipped under contract, 467, note 2.

When loss of cattle is a peril of the sea, 489, 492, note 70.

Liability of carrier if he misleads shipper as to date when car will be furnished, 496, note 7.

Liability of connecting carrier for defective bedding, 500.

Carrier's duty in furnishing cars for live stock, 509.

Duty of carrier to provide pens and facilities for loading or unloading, 510.

Pens must be kept in order, 510.

Effect of "owner's" risk exemption on carrier's duty to unload live animals, 510, note 52.

Initial carrier liable for injury sustained by animals in pens although injury does not develop until they have passed into the possession of a connecting carrier, 510.

Giving preference to shippers in furnishing cars, 520, note 15.

Discrimination in carriage of live stock and affording proper facilities under section three of Interstate Commerce Act, 556.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Live animals should be carried on deck, 605.

Directions of shipper as to mode of carriage must be followed, 611.

Contracting to carry stock without change of cars, carrier liable for loss if he does change, 620.

Must give live stock proper attention as such, 634.

Duty to apply water to over-heated hogs, 634.

Liability when animals die of starvation or thirst, 634.

Carrier should prevent hogs from "piling up," 634, note 36.

Liable if he smothers hog by placing it in steam-heated car, 634, note 36.

In case of accident, should place cars in position where shipper can attend to wants of animals, 634, note 36.

Should assist animals to their feet, 634, note 37.

In absence of special contract, carrier bound to feed and water animals, 634, note 27.

Rule applicable to carriers by water as well as by railroad, 634.

Initial carrier liable for negligence though injury develops on line of connecting carrier, 634.

[REFERENCES ARE TO SECTIONS.]

LIVE ANIMALS—con.

What evidence admissible as to condition of cattle, 634, note 37.

Injury to cattle from cold, 634, note 37.

Space for cattle must be sufficiently ventilated, 635.

Care due pregnant or sick animals, 636.

Rule in Michigan with reference to caring for live stock, 637.

Carrier must provide suitable places for feeding and watering live stock, 638.

Federal 28 hour act, 638, note 49.

Carrier must take precautions against animals injuring each other in loading, or unloading, 638.

Carrier's duty in the management of vehicles containing live stock, 639.

Liable for injury through jerks and jars, 639.

Shipper may assume duty by contract to care for live stock while in transit, 640.

But he must be given reasonable opportunities and facilities for doing so, 641.

Request of shipper for opportunities and facilities must be reasonable and necessary, 641.

Failure of shipper to furnish caretaker does not excuse subsequent negligence of carrier, 642.

But knowledge by carrier of shipper's omission is essential, 642.

Carrier liable for negligence in loading or unloading stock notwithstanding contract that shipper shall do so, 643.

Same rule true as to shipper, 643.

Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock, 644.

When carrier liable for loss from delay in transportation of live stock, 651, and notes.

Negligent delay in transportation of live stock renders carrier liable, 652, note 20.

Unavoidable delay in the shipment of live stock, 653, note 21.

Carrier must provide suitable lots or yards for delivering live stock, 715.

Burden of proof where property injured consists of live stock, 1357.

LIVERY STABLE KEEPERS—

Are not common carriers, 96.

[REFERENCES ARE TO SECTIONS.]

LIVE STOCK (See LIVE ANIMALS)—

LOADING—

Effect of unskilful loading by shipper, 333.

Meaning of word "loading" in section one of Harter Act, 350.

Carrier may stipulate for exemption from liability for loss in loading live stock, 419.

Carrier's duty in loading live stock, 638.

Shipper may contract to load live stock, 640.

But he must be given reasonable opportunities and facilities to do so, 641.

Carrier liable for his negligence in loading stock notwithstanding contract that shipper shall do so, 643.

Same rule true as to shipper, 643.

Loss from delay through inadequacy of loading facilities, 652, note 20.

Demurrage for delay in loading, see DEMURRAGE.

LOCKOUT—

Inability to obtain sufficient number of laborers not *ejusdem generis* with lockout, 841.

LOCOMOTIVE (See ENGINE)—

Riding upon, 1000.

LOG-DRIVING COMPANIES—

Not common carriers, 98.

LOGS—

When loss of logs is peril of the sea, 488, 492, note 70.

Loss in towing logs, 626.

LONG AND SHORT HAUL CLAUSE—

Under Interstate Commerce Act, 569, *et seq.*

Under State statutes, 598, *et seq.*

LOOKOUT—

Absence of lookout affords no presumption that vessel was improperly manned, 381.

Absence of lookout a fault in "management" of vessel, 381.

LORD CAMPBELL'S ACT—

At common law, no action maintainable for death of human being, 1384.

Lord Campbell's act, common law changed by, 1384.

Under Lord Campbell's act, wife, husband, parent or child may sue in name of executor of deceased person, 1384.

Jury may give such damages as are proportioned to injury, 1384.

[REFERENCES ARE TO SECTIONS.]

LORD CAMPBELL'S ACT—con.

Similar acts passed in most if not all of American states, 1385.

Many such acts framed with reference to actions against railroad companies, 1385.

Whether statute gives new right of action or merely removes common-law bar to recovery, 1386.

Where statutes of both kinds exist, a recovery under one will be a bar to a recovery under other, 1386.

Extraterritorial effect of these statutes, 1387.

Generally only co-extensive with political jurisdiction of state, 1387.

Where proof of statute of state where death is caused is not made, common law presumed to prevail, 1387.

Existence of statute in state where action brought creates no right of action for injury inflicted in another state, 1387.

When right of action created in one state may be prosecuted in other states, 1388.

When right of action created by statute in one state is not inconsistent with statutes or public policy of another state, it may be enforced in courts of latter state, 1388.

Where right of recovery given by statutes is penal in character, it may be enforced in other jurisdictions, 1388.

Who may sue under these statutes, 1389.

Right of action usually given to personal representative of deceased person, 1389.

Who may sue when action is brought in state other than one where death is caused, 1390.

When action brought under foreign statute, suit must be by party named in statute, 1390.

Broad rule of United States Supreme Court, 1390.

Cases holding that action can be maintained only by executor or administrator appointed under laws of state where the statute sued under was enacted, 1390.

But contrary doctrine is supported by weight of judicial authority, 1390.

Effect of deceased's contributory negligence or his settlement of the action, 1391.

Settlement by beneficiary for the injury, or his own contributory negligence, will ordinarily bar him from right to a recovery, 1392.

But settlement by one beneficiary, or contributory negligence of one beneficiary, will not affect rights of other beneficiaries, 1392.

[REFERENCES ARE TO SECTIONS.]

LORD CAMPBELL'S ACT—con.

- What law governs as to effect of contributory negligence or of a release on right of recovery, 1393.
- When existence of kin must be shown, 1394.
- Existence of next of kin must be shown where action is given for benefit of such persons, 1394.
- Where action is given generally to personal representative of deceased, proof of next of kin need not be made, 1394.
- Where action is given for benefit of deceased's estate, proof of next of kin need not be made, 1394.
- Aliens, action may be brought for benefit of, 1395.
- Posthumous children, recovery may be had for, when "children" of deceased are named in statute as beneficiaries, 1395.
- Illegitimate children, no recovery can be had for, when only "children" named in statute as beneficiaries, 1395.
- Grandchildren, no recovery can be had for, when only "children" named in statute as beneficiaries, 1395.
- Effect of limitation as to time of bringing suit, 1396.
- Limitation begins to run at time of wrongful death, 1396.
- Time of limitation named in statute will control, 1396.
- But if no time limitation exists in statute, statute of limitations of forum governs, 1396.
- Measure of damages, 1397.
- If statute is a survival statute, measure of damages is determined as in ordinary actions, 1397.
- Where statute creates new cause of action, and recovery is given generally to personal representative of deceased, or for benefit of his estate, damages are such sum as deceased would probably have earned in his lifetime, 1397.
- Where statute creates new cause of action, and recovery is for benefit of next of kin or certain designated beneficiaries, damages are pecuniary loss sustained by those entitled under the statute to benefits, 1397.
- Word "pecuniary" looks to prospective advantages of pecuniary nature which have been cut off by premature death, 1397.
- Word "pecuniary" excludes those losses which result from deprivation of society and companionship of relatives, 1397.
- Evidence that deceased had life insured, immaterial, 1397, note 28.
- Remarriage of widow, not to be considered in abatement of damages, 1397, note 28.
- Receipt of mortuary benefits, not to be considered in abatement of damages, 1397, note 28.

[REFERENCES ARE TO SECTIONS.]

LORD CAMPBELL'S ACT—con.

- Savings of deceased will not decrease widow's recovery, 1397, note 28.
- Evidence of pecuniary condition of next of kin, immaterial, 1397, note 28.
- Damages for loss of prospective earnings must be specially pleaded, 1397, note 28.
- Damages reckoned from date of death and not date of injury, 1397, note 28.
- Damages for mental suffering of beneficiaries not to be allowed, 1398.
- States following contrary doctrine, 1398.
- Nominal damages, when may be recovered, 1399.
- Rule in Illinois, 1399.
- Punitive damages, when recoverable, 1400.
- Jury, province of, in allowing damages, 1401.
- Damages, question of, pre-eminently one for jury, 1401.
- Damages, maximum limit of, usually fixed by statute, 1401.
- Distribution of damages recovered, 1402.
- Usually provided for by statute, 1402.
- In some states, distribution of damages left to jury, 1402.
- In others, intestate laws govern, 1402.
- Amount recovered, usually free from claims of creditors and legatees, 1402.
- But where amount recovered is regarded as an asset of deceased's estate, creditors entitled to share in proceeds, 1402.

LOSS (see ACCIDENT; ACT OF GOD; ACTIONS; BAGGAGE; BURDEN OF PROOF; CARRIER WITHOUT HIRE; COMMON CARRIER; CONNECTING CARRIERS; DAMAGES; DELIVERY BY CARRIER; DELIVERY TO CARRIER; EVIDENCE; LIMITATION OF LIABILITY BY CONTRACT; LIVE ANIMALS; NEGLIGENCE; NOTICE; PARTNERSHIP; PRESUMPTIVE EVIDENCE; PRIVATE CARRIER; PUBLIC ENEMY; PUBLIC AUTHORITY; WAR; and particular headings according to nature of goods)—

- Act of God, not liable for loss by, 268, *et seq.*
- Act of God, must be proximate cause of, to excuse carrier, 274.
- Act of God, to excuse carrier for, human agency must not have intervened, 275, 276, 277.
- Act of God, prudence or mistaken judgment no excuse for loss by, 278.
- Act of God, no excuse for, when carrier negligently exposes goods to such danger, 288, 289, 290, 291, 292.

[REFERENCES ARE TO SECTIONS.]

LOSS—con. -

- Act of God, no excuse for, when vessel unseaworthy, 293.
- Act of God, no excuse for, when carrier deviates from usual course, 294, 295, 296.
- Act of God, whether excuse for, when goods unreasonably delayed in transit, 297, *et seq.*
- Act of God, effect of, as excuse for, where carrier has wrongfully refused to deliver, 313.
- Agister, not liable for, as common carrier, 99.
- Baggage, liability for, when retained by passenger, 109.
- Baggage must be delivered for immediate transportation to establish liability as common carrier for, 112, note 23.
- Baggage, carrier liable as common carrier for, 1241.
- Baggage, contributory negligence of passenger as affecting liability of carrier for, 1260, 1272.
- Baggage, liability of carrier for, where passenger retains possession of, 1257, 1264.
- Baggage, liability of carrier for, when passenger retains custody of, in sleeping-car, 1266.
- Baggage, liability of carrier for, when passenger takes same into his stateroom, 1268, New York rule, 1271.
- Baggage, sleeping-car company not liable for, as common carrier, 1273.
- Baggage, liability of carrier for, when owner not a passenger, 1274, 1275.
- Baggage, liability of carrier for, when accompanied by another than owner, 1276.
- Baggage of wife, liability of carrier for, when accompanied by husband; of child, when accompanied by parent, 1277.
- Baggage, not accompanied by owner, when carrier liable for, 1278.
- Baggage, when carrier liable for, as freight, 1279.
- Baggage, passenger lying over—baggage going on, when carrier liable for, 1280.
- Baggage, when liability of carrier for loss begins, 1281.
- Baggage, delivery of, to wrong connecting carrier, when carrier liable for loss due to, 1282.
- Baggage, delivery of at destination, liability of carrier for, pending removal, 1284, *et seq.*
- Baggage, negligence of subsidiary carrier, liability of carrier for loss due to, 1292.
- Baggage, contracts limiting liability for, 1297, 1298, 1299.
- Baggage, liability of carrier for, where passenger carried gratuitously, 1300.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Bailee, same degree of care to protect from, not required under all circumstances, 6.
- Bailee, gratuitous, liable for, only where guilty of gross neglect, 7, 8.
- Bailees, all liable for malfeasance and fraud, 14.
- Bailee, liability for, may be regulated by contract, 40.
- Bailee, extent to which he may limit his liability for, 40.
- Bailee, liability of, for injury to goods subsequently lost by accident, 41.
- Bailments, law of, insufficient to determine liability of carrier for, 9.
- Bank notes, when carrier not liable for, as baggage, 1249.
- Bedding, when carrier liable for, as baggage, 1246, 1249, note 14.
- Bill of lading, signing by one party, effect of, on limitation of carrier's liability for, 412.
- Bill of lading, misconstruction of by shipper, carrier not liable if loss due to, 624.
- Books, when carrier liable for, as baggage, 1246, 1249, note 5.
- Brandy, loss of by bailee, 38.
- Bridge company, not liable for, as common carrier, 103.
- Burden of proof, on carrier to show that loss falls within provided exception, 449.
- Camera, when carrier liable for, as baggage, 1246.
- Canal-boat, owner of, liable for loss of goods as common carrier, 75.
- Carpeting, when carrier liable for, as baggage, 1250, note 16.
- Carrier by water, liability of, for loss due to improper delivery, 687, *et seq.*
- Carrier without hire, not liable for, by robbery unless negligent, 23.
- Carrier without hire, suit against, requisites of declaration for, 34.
- Cloak, when carrier liable for, as baggage, 1246.
- Cloth, when carrier liable for, as baggage, 1246.
- Clothing, when carrier liable for, as baggage, 1246, note 31.
- Clothing, carrier not liable for, as baggage, when retained in custody of passenger, 1269.
- Common carrier, liability of common carrier for, distinguished from that of other bailees, 4.
- Common carrier, liable for, as such, only when carriage is for hire, 61.
- Common carrier, not liable for, until goods delivered for transportation, 72.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Common carrier, liability for, usually limited by contract, 153.
- Common carrier, not bound to assume liability for, beyond own line, 226.
- Common carrier, English rule as to liability for, beyond own line, 228, 229, 230.
- Common carrier, English rule as to liability for, beyond own line, denied in majority of states, 231.
- Common carrier may, by contract, exclude liability for, beyond own line, 233.
- Common carrier, may, by contract, assume liability for, beyond own line, 227, 237.
- Common carrier, liability of, for loss by connecting carrier under Interstate Commerce Act, 235.
- Common carrier, extent to which he may limit his liability for, under contract for through carriage, 240.
- Common carrier, not liable for, beyond own line, under contract to carry to end of line and there to deliver to next carrier, 243.
- Common carrier, liable for, as insurer, 265.
- Common carrier, may assume more than legal liability for, 266.
- Confederate authority, carrier not liable for loss caused by, 326.
- Connecting carrier, delivery to, when complete to establish liability as common carrier for, 129.
- Connecting carrier, when initial carrier liable under Interstate Commerce Act for loss by, 235.
- Connecting carrier, how benefit of contract limiting liability for, can be claimed by, 470, 471, 472, 473.
- Consideration, what necessary to uphold contract limiting carrier's legal liability for, 475.
- Contract for assuming more than legal liability for, must be express, 267.
- Contract, what will be construed as, exempting carrier from liability for loss, 463.
- Contract limiting liability for, must be construed strictly against carrier, 464, *et seq.*
- Contract, carrier liable for loss, notwithstanding exception, if he fail to carry in manner provided by, 617, *et seq.*
- Contract, need not be express to establish carrier's liability for, 1351.
- Contracts against liability for, 14, 42.
- Costumes, when carrier not liable for, as baggage, 1249.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Conversion, effect of, on contract limiting liability for loss to agreed value, 432.
- Conversion, effect of, on condition that shipper must present notice of claim for loss within specified time, 445.
- Conversion, damages for, 1374.
- Damages, measure of, for, when action is on contract or for tort, 1358.
- Damages, measure of, for, 1360.
- Damages, measure of, for, where goods not for sale or have no market value, 1363.
- Damages, when amount of, for, limited by contract, 1364.
- Dangerous goods, carrier may stipulate for exemption in case of loss of, 423.
- Dangerous goods, liability of carrier for loss caused by, 797.
- Dangerous goods, loss caused by, liability of shipper for, 798.
- Delay, effect of, where loss due to act of God, 297, *et seq.*
- Delay, effect of, where goods destroyed by cause excepted in contract, 306.
- Delay, effect of, upon insurance against, 307.
- Delay, effect of, on condition that shipper must present notice of claim for, within specified time, 445.
- Delay, carrier liable if loss during a delay is caused by his failure to exercise reasonable care to protect goods, 631, 632, 633.
- Delivery, must be complete to establish liability as common carrier for, 105, *et seq.*
- Delivery, must be made where, to establish liability as common carrier for, 111.
- Delivery, must be for immediate transportation to establish liability as common carrier for, 112.
- Delivery, constructive, when sufficient to establish liability as common carrier for, 115, 116, 117, 118.
- Delivery, when complete to establish liability as common carrier for, 119.
- Delivery to ship, when complete, to establish liability as common carrier for, 120.
- Delivery, effect of, after notice given to stop goods in transit, upon agreement limiting recovery for loss to agreed value, 432.
- Delivery, improper, liability of carrier for loss due to, 664, *et seq.*
- Delivery by railroad of goods at destination, liability for, pending removal, 701, *et seq.*

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Delivery, liability of express company for loss due to improper, 716, *et seq.*
- Delivery of baggage to carrier, when sufficient to establish liability for, 1259, *et seq.*
- Departure, carrier liable if guilty of, notwithstanding contract of exemption against loss, 480.
- Deviation, effect of, where loss due to public enemy, 319.
- Deviation, whether carrier may show that without such, loss by act of God or public enemy would have happened, 320, 321.
- Deviation from instructions of owner, when carrier excused for loss due to, 612.
- Diligence to avoid, when immaterial, 5.
- Directions of owner, carrier liable, notwithstanding exception, if loss due to failure to follow, 611.
- Dispatch company, liable for, as common carrier, 84.
- Dog, when carrier liable for, as baggage, 1250, note 16.
- Dresses, when carrier liable for, as baggage, 1246.
- Dressing case, when carrier liable for, as baggage, 1246, note 27.
- Drover, not liable for, as common carrier, 99.
- Earthquake, loss by, when deemed due to act of God, 283.
- Easel, when carrier liable for, as baggage, 1244, 1254.
- Evidence, what sufficient to establish liability for, 1346, 1352.
- Evidence, plaintiff must show who responsible for, 1347.
- Evidence, what carrier must show to escape liability for, 1353, *et seq.*
- Explosion, loss by, not due to act of God, 281.
- Express company, liable for, as common carrier, 80.
- Fast freight line, liable for, as common carrier, 72.
- Feather-bed, when carrier not liable for, as baggage, 1249.
- Ferryman, when liable for, 66, 67.
- Ferryman, delivery to, when complete to establish liability as common carrier for, 128.
- Fire, how contract against loss by, construed, 42.
- Fire, loss of goods by, while awaiting transportation, 72, note 61.
- Fire, loss of baggage by, while awaiting transportation, 76, note 60.
- Fire, loss by, unless caused by lightning, not due to act of God, 279.
- Fire, carrier may stipulate for exemption in case of loss by, 420.
- Fire, loss by, not within exception of perils of the sea, 489.
- Fishing tackle, when carrier liable for, as baggage, 1247. 1254.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Fraud, effect of, by owner, on liability of carrier for loss of goods, 330, 331, 332.
- Fraud, no circumstances of, will excuse carrier from liability for loss due to improper delivery, 668.
- Freight, when carrier liable for, as baggage, 1250.
- Fruit, carrier not liable for, as baggage, 1249.
- Groceries, carrier not liable for, as baggage, 1249.
- Hand-bag, liability of carrier for, when dropped from car window, 1267.
- Harter Act, effect of, on liability of carrier by water for, 345, *et seq.* See **HARTER ACT.**
- Household goods, carrier not ordinarily liable for, as baggage, 1249.
- Inherent nature of goods, effect of, on liability of carrier for, 334.
- Intermediate carrier, liable for, although initial carrier has contracted for through carriage, 236.
- Interstate Commerce Act, effect of, on liability of initial carrier for loss by connecting carrier, 235.
- Inundation, loss by, when deemed due to act of God, 282.
- Jettison, loss by, when within exception of perils of the sea, 485.
- Jewelry, when carrier liable for, as baggage, 1246.
- Jewelry, when carrier not liable for, as baggage, 1249.
- Jewelry, carrier not liable for, as baggage, when retained in custody of passenger, 1269.
- Laces, carrier liable for, as baggage, 1245.
- Land vehicle, when proprietor of, liable for, as common carrier, 68.
- Landslide, loss by, whether considered as due to act of God, 285.
- Legal process, whether carrier liable for loss due to seizure of goods under, 327, 738, *et seq.*
- Letter file, when carrier not liable for, as baggage, 1249.
- Liability, effect of Harter Act on, for loss by water carriers, 345, *et seq.* See **HARTER ACT.**
- Limitation, contracts of, usually regulate liability of carrier for, 388.
- Limitation, contracts of, in reference to carrier's liability for loss under English Land Carrier's Act, 393, *et seq.*
- Limitation, by contract of, carrier may diminish his legal liability for, 401.
- Limitation, contracts of, restricting carrier's legal liability for, prohibited in some states, 405.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Limitation, contract of, need not be in writing to fix carrier's liability for, 411.
- Limitation, terms of, must be embodied in contract in order to relieve carrier from liability for, 415.
- Limitation, extent to which carrier may limit legal liability for, 418.
- Limitation, contracts of, fixing amount of damages recoverable in case of loss, 425, *et seq.*
- Limitation, carrier may limit time within which claim shall be made for, 422, *et seq.*
- Limitation, contracts of, limiting recovery for loss to agreed value of goods, 426, *et seq.*
- Limitation, contracts of, limiting recovery to agreed value of goods where loss only partial, 429.
- Limitation, contracts of, limiting recovery for loss of goods to value at time and place of shipment, 430.
- Limitation, contracts of, limiting liability for loss to fixed amount without regard to value, 431.
- Limitation, effect of, when in receipt, that unless informed of true value of goods, carrier will not be liable in case of loss for more than stated amount, 433, *et seq.*
- Limitations of liability for, in bills of lading of carriers by water, 481, *et seq.*
- Live animals, when delivery of, complete to establish liability as common carrier for, 114.
- Live animals, carrier not liable for loss due to inherent nature of, 335, *et seq.*
- Live animals, carrier liable, as such, for loss of, 339, 341.
- Live animals, cases holding carrier not liable for, as such, 340.
- Live animals, effect of carrier's negligence where loss of, due to their peculiar nature, 342.
- Live animals, extent to which carrier may limit legal liability for loss of, 419.
- Live animals, when carrier liable for loss due to his failure to care for, 634.
- Live animals, liability of carrier for loss due to improper management of vehicles, 639.
- Live animals, negligence in unloading, carrier liable for loss due to, 643.
- Livery, when carrier liable for, as baggage, 1246.
- Mail carrier, not liable for, as common carrier, 94.
- Merchandise, carrier not ordinarily liable for, as baggage, 1249.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Merchandise, when carrier liable for, as baggage, 1250.
- Messenger company, when liable for, as common carrier, 97.
- Misfeasance, carrier liable when guilty of, notwithstanding contract of exemption, 478.
- Mistake, effect of, by owner, on liability of carrier for loss, 333.
- Mistake, no circumstances of, will excuse carrier from liability for loss due to improper delivery, 668.
- Money, loss of, by bailee, 38.
- Money, when carrier liable for, as baggage, 1246, 1249.
- Money, carrier not liable for, as baggage, when retained in custody of passenger, 1269, 1270.
- Music, manuscript, when carrier liable for, as baggage, 1246.
- Nails, when carrier not liable for, as baggage, 1249.
- Napkin rings, carrier not liable for, as baggage, 1249.
- Navigation, loss by dangers of, 482, *et seq.*
- Negligence, whether carrier may show that without such, loss by act of God or public enemy would have happened, 320, 321.
- Negligence, carrier cannot contract against liability for loss by, 450.
- Negligence, New York rule as to right of carrier to contract against liability for loss by, 454.
- Negligence, rule in Illinois as to right of carrier to contract against liability for loss by, 455.
- Negligence, carrier liable when guilty of, notwithstanding contract of exemption, 477.
- Negligence, carrier liable, notwithstanding exception of perils of the seas, if loss caused by, 492.
- Non-feasance, loss due to, not a conversion, 1372.
- Notice, effect of, when in receipt, that, unless informed of true value of goods, carrier will not be liable in case of loss for more than stated amount, 433, *et seq.*
- Notice, not ordinarily sufficient to qualify carrier's legal liability for, 406, 407, 437.
- Notices, not intended to limit carrier's legal liability for, 414.
- Notice under English Carrier's Act, effect of, on carrier's liability for, 436, 439.
- Opera glass, when carrier liable for, as baggage, 1246.
- Overcoat, when carrier liable for, as baggage, 1246.
- Owner, carrier not liable for loss caused by acts of, 328, 329.
- Paper, sheets of, when carrier not liable for, as baggage, 1249.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Partial, effect of contract limiting liability of carrier when loss, 429.
- Partnership, when created so as to impose joint liability for, 250, *et seq.*
- Partnership, not necessary between carriers to create joint liability for, 251.
- Partnership between corporations, when created so as to impose joint liability for, 264.
- Passenger vehicle, proprietor of, usually liable for, only as to baggage, 69.
- Perils of the sea, loss by, 482, *et seq.*
- Pillows, when carrier liable for, as baggage, 1247.
- Pistols, when carrier liable for, as baggage, 1246.
- Police power, carrier not liable for loss caused by, 325.
- Postmaster, not liable for, as common carrier, 94.
- Price-book, when carrier liable for, as baggage, 1246.
- Private carrier, when liable for, 4, 16, 37.
- Private carrier, undertaking to carry, sufficient consideration to establish liability for, 18.
- Private carrier, degree of negligence which creates liability for, 24, 25, 26, 27.
- Private carrier, not liable for, by robbery, unless negligent, 39.
- Private carrier, may contract against liability for, excepting that caused by unfaithful or dishonest conduct, 14, 40.
- Private carrier, test of liability for, 42.
- Private carrier, may warrant against, 45.
- Proof, stipulations as to amount of, required to prove negligence causing loss, 456.
- Public authority, carrier not liable for loss caused by, 324.
- Public enemy, carrier not liable for loss by, 314, *et seq.*
- Public enemy, carrier liable for loss by, where such is caused by his negligence or deviation, 319.
- Quilts, when carrier liable for, as baggage, 1247.
- Railroad company, liable for, as common carrier, 76.
- Railroad company, when deemed to have accepted goods so as to establish liability as common carrier for, 124.
- Receipt, acceptance of, usually creates contract limiting carrier's legal liability for, according to its terms, 408, 409.
- Receipt, cases holding mere acceptance of, insufficient to create contract limiting carrier's liability for, 410.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Receipt, to be effectual in limiting carrier's legal liability for, must be given to and accepted by shipper when goods accepted for carriage, 416. See LIMITATION OF LIABILITY BY CONTRACT.
- Receiver, liable for, as common carrier, when, 77.
- Refrigerator car, liability for loss caused by failure to provide, 505.
- Regalia, when carrier not liable for, as baggage, 1249.
- Regulations, effect of, on liability of carrier for, 437.
- Revolver, when carrier liable for, as baggage, 1246.
- Rifle, when carrier liable for, as baggage, 1246, note 26.
- Rings, when carrier liable for, as baggage, 1246, note 26.
- Robbers, carrier may stipulate for exemption in case of loss by, 422.
- Robbery, carrier liable, notwithstanding exception of perils of the seas, if loss caused by, 491.
- Sample trunk, when carrier liable for, as baggage, 1250.
- Savings bank, when carrier liable for, as baggage, 1246.
- Ship, when delivery to, complete to establish liability as common carrier for, 120.
- Shipowner, liable for, as common carrier, 74.
- Silverware, when carrier not liable for, as baggage, 1249.
- Sparks, duty to provide against loss by, 503.
- Stage line, not liable for, as common carrier unless that character has been assumed, 85.
- Stage properties, when carrier not liable for, as baggage, 1249.
- Steamboat, owner of, liable for as common carrier, 75.
- Stoppage *in transitu*, failure to retain goods after notice of, liability of carrier for loss due to, 757, *et seq.*
- Stowage, defective, carrier liable for losses caused by, 602.
- Stowage, improper, when carrier liable for losses caused by, 603, *et seq.*
- Strikes, carrier may stipulate for exemption in case of loss by, 421.
- Suit for, limitation as to beginning, 448.
- Suit, who may bring for, 1304, *et seq.*
- Surgical instruments, when carrier liable for, as baggage, 1246.
- Telescope, when carrier liable for, as baggage, 1246, note 27.
- Theft, carrier liable, notwithstanding exception of perils of the seas, if loss caused by, 491.
- Tools, when carrier liable for, as baggage, 1246.
- Towing boat, proprietor of, not liable for, as common carrier, 92.

[REFERENCES ARE TO SECTIONS.]

LOSS—con.

- Trunk, delivery of, when complete, to establish liability of common carrier for, 127.
- Turnpike company, not liable for, as common carrier, 103.
- Underclothing, when carrier liable for, as baggage, 1246.
- Usual route, carrier liable for loss, notwithstanding exception, if he depart from, 613.
- Usual route, carrier not liable for loss if he depart from, when such departure is in accordance with established usage, 613.
- Vehicles, responsibility for furnishing insufficient, 497.
- Vehicles, where owned by another, liability of carrier where loss due to their defective condition, 498.
- Vehicles, where furnished by initial carrier, liability where loss due to their defective condition, 499.
- Vehicles, when received from another carrier, liability where loss due to their defective condition, 500.
- Vehicles, exposed, liability for loss by, 504.
- Warehouseman, when liable for, as common carrier, 71.
- Warehouseman, carrier may stipulate for liability of, while goods awaiting further conveyance, 424.
- Watch, when carrier liable for, as baggage, 1246.
- Wearing apparel, when carrier liable for, as baggage, 1253, 1265.
- Weather, inclement, loss by, where carrier has failed to provide suitable vehicle, 502.
- Wharfinger, when liable for, as common carrier, 71.
- Wind, loss by, when deemed due to act of God, 286.
- Wrong delivery, when carrier guilty of a conversion, 680.
- Wrong delivery, liability of carrier for loss due to, while holding goods as warehouseman, 681.
- Wrong person, delivery to, liability of carrier for loss due to, 669, *et seq.*

LOST TICKET—

- Passenger must pay again, 1036, and notes.

LOST TIME—

- Making up, when negligence, 926, note 26.

LUMBER—

- Delivery of lumber to carrier where cars are loaded on side track, 125.
- Railroad companies cannot graduate charges according to prosperity attending lumber trade, 530, note 23.
- By custom of particular trade lumber may be carried on deck, 605.

[REFERENCES ARE TO SECTIONS.]

LUMBER—con.

In such case owner entitled to contribution for loss by jettison, 605.

If consignee wrongfully refuses to pay demurrage charges on a carload of lumber, the railroad company may seal the car and place it beyond consignee's control, 862, note 6.

Injury to carrier from beam while discharging lumber from boat, 890, note 1.

LUMBER CAR—

Riding on, not necessarily contributory negligence, 1217, note 15.

LUMBERMEN—

Duty of carrier towards, 1018.

LUMP SUM—

When payable as freight, 800.

LUNCH—

Excluding from depots persons who sell lunch to passengers, 943.

MACHINERY—

When breaking of a junk ring on a steamship engine cylinder is within exception against accidents to "machinery," 464, note 39.

Liability of passenger carrier for defect in machinery due to fault of manufacturer, 906-909.

Breaking down of, *prima facie* case of negligence, 1414.

MAIL—

When notice of arrival of goods sent by mail by carrier by water is sufficient, 690.

Sufficiency of postal card notice by express company in small village of arrival of goods, 717, note 12.

MAIL AGENTS—

Persons in mail service not common carriers, 94.

Injuries to, 1017.

MAIL BAG—

Injury to passenger from mail bag being hung in too close proximity to car, 925.

May be negligence to permit mail bag to remain on station platform, 935.

Injury to person assisting passenger by mail bag thrown from car, 991, note 23.

Injury to passenger from throwing off of, 1011.

[REFERENCES ARE TO SECTIONS.]

MAIL CAR—

Riding on, when contributory negligence, 1200.

MAIL COACHES—

Degree of care to be used by, as carriers of passengers, 893.

MALFEASANCE—

All bailees liable for malfeasance and fraud, 14.

Common or public carriers more absolutely answerable than ordinary bailees, 14.

MALICIOUS ACTS—

Liability of carrier for malicious acts of servants, 1093, *et seq.*

MALTREATMENT OF PASSENGER—

Damages in case of, 1433.

Where passenger wrongfully expelled from train, indignity, rudeness, insult or unnecessary force which accompanies act of expulsion, may be considered by jury in aggravation of damages, 1433.

Where passenger wrongfully expelled from train, feelings of shame and humiliation endured, proper elements of damage, 1433.

Where expulsion not wrongful, carrier liable if unnecessary force or violence be used, 1433.

Maltreatment of passenger, how when provoked by insulting language or violent conduct of passenger, 1434. See, also, 1102.

Insulting language by passenger toward carrier's servant, no justification for assault upon passenger, 1434.

Carrier's servant may use force to repel an attack upon his person by passenger, 1434.

But must use only such force as is reasonably necessary to his defense and protection, 1434.

Where assault upon passenger by carrier's servant is provoked by passenger's insulting language or violent conduct, carrier may offer proof of passenger's language or conduct in mitigation of damages, 1434.

Rule that such proof may be offered in mitigation of both compensatory and exemplary damages, 1434.

Rule that such proof is admissible in mitigation of exemplary damages only, 1434.

[REFERENCES ARE TO SECTIONS.]

MANAGEMENT OF VEHICLES—*Common carriers—*

Carrier's duty as to the management of vehicles containing live stock, 639.

Passenger carriers—

Carrier must exercise the highest degree of care and diligence, 923.

Liable if he so carelessly manages his trains that a collision ensues, 923.

Liable if statutory requirements as to making up train or stopping are not complied with, 923.

When leaving wounded animal near track is negligence, 923.

When operation of train with locomotive in the rear is negligence, 923, note 18.

When running of a freight train between passenger train and station is negligence, 923, note 18.

When failure to give proper signals is negligence, 923.

When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.

When failure to have a proper and fit telegraph line for running trains is negligence, 923, note 23.

Carrier liable for negligence of engineer in failing to discover animal on track, 923.

Carrier liable for negligent collision of ferryboat with dock, 923.

If violent storm drives freight train back on passenger track, servants of railroad company must exercise proper diligence in flagging passenger train, 923, note 24.

Carrier must keep track free from obstructions, 925.

Liable if freight platform constructed so near track that objects on it come in contact with arm of passenger resting on window-sill of passing car, 925.

Or if he permits mail bag to hang too near track, 925.

Or if freight car is placed so that its door, swinging open, might injure passenger on passing car, 925.

Or if workmen are permitted to pile stone too near the track, 925.

When railroad company liable for obstruction placed near its track by third person, 925.

[REFERENCES ARE TO SECTIONS.]

MANAGEMENT OF VEHICLES—*Passenger carriers*—con.

Carrier must exercise high degree of care to avoid sudden jerks or jars, 924.

Negligence to make a running switch, 924.

Carrier liable for injuries resulting from jerks and jars resulting from use of too small an engine, 924.

But carrier not liable for injuries from jar caused by fellow-passenger inadvertently setting emergency brake, 924, note 27.

Liability of railroad company where stone, attached to derrick, is swung into passing train, 925.

Liability of railroad company where it permits gravity road to be used in connection with its track, 925, note 32.

Duty of railroad company to keep a sharp lookout for cattle or other animals upon track, 925, note 32.

Running railroad train at high speed not of itself negligence, 926.

But attending circumstances may make it negligence, 926.

Consideration should be given to the character of the train, condition of road-bed, sharpness of curves, etc., 926.

When carrier liable for excessive speed although passenger was standing on platform of car, 926, note 26.

Nothing can justify running train at high speed over track known to be in a dangerous condition, 926, note 26.

Making up lost time, 926, note 26.

Injury to passenger from sudden closing of door or window on carrier's vehicle, when negligence, 927.

In absence of custom, carrier need not provide entrance to its cars by express or baggage cars, 927.

Carrier under no duty to provide vestibuled trains, 927.

If vestibules are provided, carrier must see that they are kept in repair, and are not needlessly left open, 927.

MANAGEMENT OF VESSEL—

Absence of lookout a fault in "management" of vessel, 381.

For faults or errors in management of vessel, regarded as a vessel, shipowner is excused from liability by Harter act, 382.

For faults or errors in management of vessel, regarded as a cargo bearing carrier, he is not excused, 382.

Examples of faults in management, 382, note 1.

[REFERENCES ARE TO SECTIONS.]

MANDAMUS—

Will not lie to compel carrier to accept and carry goods, 149.

When mandamus will lie to compel carrier to furnish coal cars, 512, note 59.

When mandamus will lie to compel railroad company to haul special cars or trains, 512, note 60.

Mandamus under section twenty-three of Interstate Commerce Act, 523.

To compel carrier to sell commutation ticket to individual, 1030.

MANDATARIES (See CARRIER WITHOUT HIRE)—

Actions against, 16.

Degree of negligence which creates liability, 23, 24, 25, 26, 27.

Requisites of declaration against, 34.

MANDATORY INJUNCTION—

Lies to compel acceptance and carriage of goods, when, 149.

MANNING VESSEL—

What is due diligence in, 381.

Use of Chinese crew may show lack of due diligence in manning vessel, 381.

Gross negligence of master will raise presumption of negligence in his selection, 381.

Absence of look-out affords no presumption that vessel was improperly manned, 381.

MANUSCRIPT MUSIC—

When baggage, 1246.

MANUFACTURER—

As common carrier, 54.

Liability of passenger carrier for defects in vehicles and machinery attributable to fault of manufacturer, 906-909.

Same rule applies as to bridges, 910.

MARBLE—

Improper stowage of, 354, note 24.

MARINERS—

Who are, under contract limiting liability, 469.

MARITIME LIEN—

None on vessel for loss of baggage where baggage left on pier without directions, 120.

[REFERENCES ARE TO SECTIONS.]

MARKET—

Sale of goods by carrier must be where there is a market and competition, 793.

Loss of, when compensated in damages, 1370.

MARKET VALUE—

Carrier as warehouseman not liable for depreciation in, 685.

When measure of damages, 1360, *et seq.*

MARKING—

Goods for through transportation, as evidence of contract for through transportation, 238.

Marks on goods directing mode of shipment not to be disregarded, 611.

Effect of incorrect marking of addresses on packages, 677.

Effect of marking goods "C. O. D.," 728.

Marking a false valuation of goods on package, 806, note 37.

MASQUERADE COSTUMES—

Not baggage, 1249.

MASTER—

Recovery for injuries to servant by, 1376.

MASTER OF VESSEL—

Authority of master to sign bills of lading, 163-166.

Vessel is liable for failure to deliver at all through master's negligence in overlooking goods, 361.

Gross negligence of master will raise presumption of negligence in his selection, 381.

Whether mistake of master as to signal lights is a peril of the sea, 484.

Carrier liable, notwithstanding exception against perils of the sea, when master neglects usual precautions, 492, note 70.

Shipowner must provide competent master, 497.

Master of vessel may sell cargo, when, 788.

Master not absolutely bound to transship, 789.

Master may act as agent of owner of vessel for making transshipment, 825.

But cannot bind him to pay more freight than was agreed in original contract, 825.

Power to bind owner of goods for increased freight allowed only in case of clear necessity, 825.

Shipowner not entitled to demurrage where delay is due to his own default or that of master of vessel, 855.

Demurrage not allowable where master wrongfully refuses to receive all the cargo contracted for, 855.

[REFERENCES ARE TO SECTIONS.]

MASTER OF VESSEL—con.

Or where delay occurs through mistaken claim of master that bills of lading are incorrect, 855.

Charterer not liable for delay due to master's absence from vessel, 855.

If master refuses to deliver goods until admittedly extortionate charge for demurrage is paid, consignee may abandon goods and recover their value, less lawful charges, 855.

No demurrage allowable for delay through arbitrary stoppage by master until security given, 855.

Master cannot detain goods on board for non-payment of freight, or general average, and charge demurrage, 855.

Quasi demurrage for a reasonable sum might be allowable under such circumstances, 855.

MATE—

Contract against fault of pilot, master or mariners does not include carelessness of mate, 463.

Assault on passenger by, 1096.

MAXIMUM RATE—

Interstate Commerce Commission has power to fix a reasonable maximum rate under section fifteen of Interstate Commerce Act, 523.

State legislatures have power to fix a reasonable maximum rate, 574, note 8.

Legislature cannot fix maximum rate and then make exceptions to it, 574, note 9.

MEANS OF CONVEYANCE—

Care and diligence required of passenger carrier dependent upon, 895.

MEASUREMENT—

Rule when freight is to be paid for by, 812, 813.

MEAT (See ICING CARS)—

Stowage of, 357, note 31

MEDICAL EXPENSES—

Recovery of, 1378, 1423.

MEDICINE—

Carrier not liable for mistakes in administering, 1163.

[REFERENCES ARE TO SECTIONS.]

MENTAL SUFFERING—

When damage recoverable for, 1427.

Not an element of damage, unless accompanied with physical injury, 1427.

But where passenger subjected to abuse, insult or malicious treatment, damages for consequent mental pain and suffering may be recovered, 1427.

Wrongful ejection, damages for mental suffering occasioned by, may be recovered, 1427.

Indignities suffered at hands of fellow passengers, which carrier could have prevented, damages for mental suffering occasioned by, may be recovered, 1427.

False arrest by carrier's servants, damages for mental distress occasioned by, may be recovered, 1427.

Passenger becoming insane through hardship attending an accident, carrier not liable in damages for insanity thus produced, 1427, note 27.

Fright, damages for, not recoverable unless accompanied by bodily injury, 1427.

But where nervous shock so great as to cause bodily injury, it may be considered as an element of damage, 1427.

Damages for, of beneficiaries in actions for death by wrongful act, 1398.

Father may recover for, when carrier unreasonably delays shipment of body of his deceased son, 1375.

MERCHANDISE—

Intended for sale not baggage, 1249.

Carrier liable as insurer of, if he accepts same as baggage with knowledge of its true character, 1250.

When carrier will be presumed to have knowledge of true character of, 1250.

Mere external appearance of closed package, not sufficient to charge carrier with knowledge that it contains merchandise, 1250.

Carrier not required to make inquiry as to contents of closed package, 1250.

Contained in trunk, paying for extra weight of, not sufficient to charge carrier with knowledge of its contents, 1250, note 19.

Knowledge by carrier that trunk contains merchandise may be inferred from general custom or manner of doing business, 1250.

[REFERENCES ARE TO SECTIONS.]

MERCHANDISE—con. .

Trunks of commercial travelers, when carrier will be charged with knowledge that such trunks contain merchandise, 1250.
Baggage-master has authority to accept merchandise as baggage when he knows its true character, 1251.

Baggage-master, knowledge gained by, that valise contains merchandise, not binding on carrier where such knowledge is obtained before valise is accepted for transportation, 1251.

Regulation prohibiting baggage-master from accepting merchandise as baggage, when passenger bound by, 1251.

Massachusetts rule as to, 1252.

Not owned by passenger, carrier not liable to owner for loss of, if accepted without knowledge of its true character, unless guilty of gross negligence, 1276.

Not owned by passenger, carrier liable to owner for loss of, if accepted with knowledge of its true character, 1276.

MERGER—

Of previous contract in bill of lading, 171-174.

MESSENGER COMPANIES—

Whether common carriers, 97.

MILEAGE—

Not the controlling factor in fixing a reasonable rate, 532, 579.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

MILEAGE TICKETS—

Right of state to compel the issuance of mileage tickets at reduced rates, 596.

Failure of carrier to provide agent with mileage exchange tickets, 1053, 1062, note 19.

Passes to personal representatives, and cannot be used in transporting remains, 1056, note 59.

Agent inserting wrong name in mileage book, 1066, note 31.

Duty of carrier to sell, 1030, note 19.

Coupons on, not good if detached, 1055.

MILK CANS—

On station platform, 935, note 1.

MILLING IN TRANSIT—

Milling in transit agreement not necessarily discriminative, 538.

[REFERENCES ARE TO SECTIONS.]

MINES—

Apportionment of cars for mines under section three of Interstate Commerce Act, 557.

MISAPPREHENSION—

No excuse for ejection, 977.

MISCONDUCT—

Of passenger, when will justify ejection, 974, *et seq.*

MISCONSTRUCTION—

Carrier not liable if loss occurs through misconstruction of bill of lading by shipper, 624.

MISDELIVERY—

Condition that claim shall be presented within a certain time no defense to action for misdelivery where carrier falsely asserted he still continued to hold the goods, 445, note 14.

Neither fraud, imposition nor mistake will excuse delivery to wrong person, 668.

Law exacts absolute certainty of carrier, 668.

Qualified refusal of carrier to deliver goods until "identity" of person demanding goods is established is not a conversion, 668.

But delivery to a wrong person is a conversion, 668.

Carrier protected in case of a refusal to deliver to unidentified consignee even though security offered, 668, note 13.

Effect of negligent delivery to person not the consignee, 669-671.

Delivery by carrier to swindler, 669, 672.

Some courts hold carrier not liable for innocent delivery to consignee though a swindler, 672.

This rule qualified even by courts which follow it, 672.

Contrary view prevails in better reasoned decisions, 673.

Delivery on forged order no excuse, 674.

Or to wrong party by mistake, 674.

Or to unauthorized agent, 674.

Delivery to janitress, 674, note 31.

How where goods are consigned to agent of carrier, 675.

How where consigned to consignee in care of another person, 676.

Effect of misdirection of goods, 677.

Carrier not liable where wrong delivery induced or ratified by owner, 678.

Delivery of goods consigned to corporation before actual incorporation, 678, note 43.

[REFERENCES ARE TO SECTIONS.]

MISDELIVERY—con.

Whether receiving goods at another place is a waiver of a misdelivery, 678, note 44.

When delivery at wrong place is deemed a conversion, 680.

Where carrier is holding as warehouseman, misdelivery is excused if induced by fraud, imposition or fault of sender or consignee, 681-684.

Shipper cannot order carrier to deliver goods from time to time, and still hold carrier liable as common carrier, 685, note 4.

MISDIRECTION—

Effect of misdirection of goods by shipper, 333, 677.

Duty of carrier when he knows that goods are misdirected, 677.

MISFEASANCE—

Mandatory answerable for, 34.

Carrier liable notwithstanding exemption if the loss be the result of his misfeasance, 478.

MISREPRESENTATION—

Where owner of goods fraudulently misrepresents their character, carrier not liable for loss, 328, 329.

MISTAKE—

Taking by mistake other goods than he is directed to take may be conversion by carrier, 148.

When indorsement of bill of lading procured by mistake, no title passes even to a *bona fide* holder, 175.

Whether mistake of master as to signal lights is a peril of the sea, 484.

Whether admitting water to vessel by mistake is a peril of the sea, 492, note 70.

Mistaken rates void under Interstate Commerce Act, 537, 806. But not under state decisions, 594, 806.

Initial carrier liable as insurer where goods are delivered by mistake to other than designated carrier, 611, note 42.

Mistake will not excuse delivery by carrier to wrong person, 668, 674.

Prior agreement as to rate of demurrage not changed by delivery of bill of lading stipulating for different rate by mistake, 832.

If charges are apparently regular, right of final carrier to lien not altered by the mistake or omission of a previous independent carrier, 867, note 24.

[REFERENCES ARE TO SECTIONS.]

MISTAKE—con.

Mistakes or errors made by first carrier, or any intermediate carrier, in giving directions for forwarding goods will not affect final carrier's right of lien, 867, note 31.

Of ticket agent in issuing ticket for shorter distance, 1039.

Issuance of ticket by mistake, duty of conductor, 1065, note 26.

MITIGATION—

Sending goods by another route in order to mitigate damages, 480.

Reasonable expense in endeavoring to reduce loss to lowest amount, may be recovered, 1362, 1366.

Party injured must make reasonable efforts to avoid loss, 1369.

Tender of goods by carrier after a conversion, may be shown in mitigation of damages, 1374.

Payment to owner by person to whom carrier has wrongfully delivered goods, may be shown in mitigation of damages, 1374.

Where passenger has received an injury, he must seek to make his damage as light as possible, 1431.

But passenger only required to exercise reasonable care and prudence, 1431.

Where assault upon passenger by carrier's servant is provoked by passenger's insulting language or violent conduct, carrier may offer proof of passenger's language or conduct in mitigation of damages, 1102, 1434.

Rule that such proof may be offered in mitigation of both compensatory and exemplary damages, 1434.

Rule that such proof is admissible in mitigation of exemplary damages only, 1434.

Fact that additional fare demanded of passenger is trifling, not to be considered in mitigation of damages, 1062, note 19.

MIXED FREIGHT AND PASSENGER TRAINS—

In operation of, passenger carrier not held to degree of care which would destroy use of such trains for their primary purpose, 899.

MOBS—

Not "public enemies," 315, 316.

Carrier may stipulate for exemption from loss caused by mobs, 421.

Loss by, not peril of sea, 491.

When carrier excused for delay caused by mobs, 657.

[REFERENCES ARE TO SECTIONS.]

MODE OF CARRIAGE—

- All common carriers bound to carry in customary mode, 611.
- Usage may be controlled by direction of owner of goods, 611..
- Carrier accepting goods with directions to carry in particular mode, bound to follow such directions, 611.
- Marks on goods, directing mode of shipment not to be disregarded, 611.
- Contracting to carry in particular manner or prescribed time, carrier held to strict compliance with his contract, 617-620.

MOISTURE—

- Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.

MOLASSES—

- Stowage of, 355, note 26.

MONEY (See COUNTERFEIT MONEY)—

- Compensation in, not necessary to constitute common carrier, 61.
- Carrier of passenger and goods not liable for money intrusted to agent, unless usage to carry money established, 86.
- Carriage of money in valise or box without disclosing fact to carrier, 331, 332.
- Delivery of money by carrier to impostor, 671.
- Delivery of money by carrier by water, 696, note 31.
- When baggage, 1246, 1249.
- Placed by passenger under pillow while asleep, liability of sleeping-car company for loss of, 1132, note 9.
- Negligently left by passenger on window sill of car, liability of carrier for, 1264, note 13.

MONOPOLY—

- A rate, though reasonable, should not tend to create a monopoly, 587.

MONTE MEN—

- Carrier may refuse to carry, 966, note 16.

MORTGAGEE—

- Right of carrier to deliver to mortgagee after conditions in chattel mortgage broken, 750, note 35.
- Delivery of goods at vendee's store at the time in possession of mortgagee does not defeat vendor's right of stoppage *in transitu*, 769.
- Lien of carrier inferior to that of mortgagee of whose rights carrier had both constructive and actual knowledge before it accepted goods for transportation, 872, note 46.

[REFERENCES ARE TO SECTIONS.]

MORTGAGE FORECLOSURE—

Amount realized on mortgage foreclosure sale as criterion of reasonableness of rates, 583, note 39.

MORTUARY BENEFITS—

Not to be considered in abatement of damages in actions for death by wrongful act, 1397, note 28.

MOTIVES OF CARRIER—

Non-delivery through commendable motives of carrier no excuse, 756.

MOVING TRAINS—

Alighting from, while in motion, 1177.

View that voluntary attempt by passenger to alight from train which he knows to be in motion is a negligent act *per se*, 1177.

Whether passenger does or does not know that train is in motion is a question for jury, 1177, note 2.

Mere fact that train fails to stop as promised by conductor, no excuse to passenger for attempting to alight, 1177, note 3.

Fact that to remain on train will subject passenger to trouble or inconvenience, no excuse to passenger for attempting to alight, 1177.

But where passenger is invited or directed to alight from moving train by an agent acting in line of his duty, and danger is not obvious, his conduct will not be *per se* negligent, 1177.

Under such circumstances, question of passenger's contributory negligence is for jury, 1177.

Brakeman, with authority to assist passengers to alight, has authority to direct passenger, being carried past his station, to alight, 1177, note 4.

But such direction must be more than mere advice or information, 1177, note 4.

Where conductor violently threatens to eject passenger, negligence of passenger in attempting to alight from moving train will be excused, 1177, note 4.

But where passenger is expressly warned not to alight, his conduct in doing so will be negligence, 1177, note 4.

Burden of proof on passenger to show facts excusing his conduct in alighting from train while in motion, 1177, note 4.

View that attempt by passenger to alight from train while in motion is not necessarily a negligent act *per se*, 1179.

This view sustained by weight of modern authority, 1179.

Under this view, question of passenger's contributory negligence,

[REFERENCES ARE TO SECTIONS.]

MOVING TRAINS—con.

in attempting to alight from moving train, is ordinarily one of fact for jury, 1179.

Circumstances attending act must be looked to, 1179.

Act of passenger, in attempting to alight from moving train, not excused where danger in doing so is great or obvious, 1180.

Snow and ice, passenger jumping from moving car upon, chargeable with contributory negligence, 1180, note 10.

Female passenger in enfeebled condition, attempting to alight from moving car, chargeable with contributory negligence, 1180, note 10.

Female passenger, weighing 200 pounds, attempting to alight from moving train, chargeable with contributory negligence, 1180, note 10.

Passenger excused where he reasonably believes he is exposed to peril, and that it is necessary for his safety, 1180.

Getting upon while in motion, 1181.

View that voluntary attempt by passenger to board moving train, contributory negligence *per se*, 1181.

Fact that passenger is induced by considerations of personal convenience to attempt to board moving train, no excuse, 1181.

Refusal of employees to stop train according to custom, no excuse to passenger for attempting to board it, 1181.

Refusal to stop train as required by law or published schedules, no excuse to passenger for attempting to board it, 1181.

Practice of railway company of receiving passengers while train in motion, no excuse to passenger for attempting to board it, 1181.

But passenger may be justified in attempting to board moving train where he is induced to do so by some act or direction of company's agent, 1181.

Station agent has no authority to direct passenger to board moving train, 1181, note 14.

Where passenger directed by conductor to board moving train, question of passenger's contributory negligence is for jury, 1181, note 14.

Train running from four to six miles an hour, passenger attempting to board, chargeable with contributory negligence, 1181, note 14.

View that attempt by passenger to board train while in motion is not necessarily a negligent act *per se*, 1182.

Under this view, question of passenger's contributory negligence,

[REFERENCES ARE TO SECTIONS.]

MOVING TRAINS—con.

in attempting to board train while in motion, is ordinarily one of fact for jury, 1182.

This view sustained by weight of modern authority, 1182.

Circumstances attending act of passenger must be looked to, 1182.

When a question of law, 1182.

Train running four miles an hour, not negligence *per se* for strong able bodied man to attempt to board, 1182, note 16.

Train running five miles an hour, passenger attempting to board, chargeable with contributory negligence, 1182, note 16.

City ordinance providing for punishment of any person getting on or off railway train while in motion, not within police power of city, 1182, note 16.

City ordinance providing for fine of any person, not in employ of railroad company, who jumps on or off train while in motion, void as unreasonable attempt to regulate rights of passenger and carrier, 1182, note 16.

Negligence of passenger in boarding train while in motion no excuse for pushing him from platform of car, 1183.

Carrier not liable where passenger, jumping on moving train, comes in contact with porter and is injured, 900, note 25.

Railroad company not bound to provide platform away from station for persons attempting to board train while in motion, 933.

Ejection from moving freight train, 964.

Ejection from moving passenger train, 1091.

Negligence of passenger in stepping from, no excuse to carrier for leaving him helpless upon track, 1173, note 1.

MUD—

On car platform or steps, 957.

MUFF—

When baggage, 1249.

MUSCHAMP'S CASE—

The rule in, 228-238.

MUTILATED TICKETS—

Duty of carrier as to, 1040.

NAILS—

Not baggage, 1249.

[REFERENCES ARE TO SECTIONS.]

NAME (See CORPORATE NAME)—

Effect of calling name of station, as excuse to passenger for attempting to alight from train at unusual place, 1187.

NAPKIN RINGS—

Not baggage, 1249.

NARROW-GAUGE CARS—

Discrimination in transfer of stock from narrow-gauge cars to standard-gauge cars, 593.

NATURAL DECAY—

See INHERENT NATURE.

NAVIGATION—

What is a fault or error in "navigation" of vessel within meaning of the Harter Act, 383.

Presuming on entire accuracy of compass is fault in "navigation" of vessel, 383.

Going into bay on ebb tide, or striking obstruction in river, are faults in "navigation" of vessel, 383.

NEGLIGENCE (See BAILMENT; CARRIER; CARRIER WITHOUT HIRE; COMMON CARRIER; PRIVATE CARRIER; CONTRIBUTORY NEGLIGENCE; PASSENGER CARRIER)—

In general—

Degrees of, 11.

Doubtful utility of distinction between, 11.

But not entirely to be ignored, 11.

No degrees of, where human life at stake, 11.

Loss of his own goods with those of another by gratuitous bailee, *prima facie* evidence of diligence, 28-30.

What gross, sometimes mixed question of law and fact, 32.

Gross negligence presumed from non-delivery of goods by carrier without hire, 31.

In action against carrier without hire necessary to aver negligence; unnecessary to aver degree of, 34.

Responsibility of private carrier for hire for negligence of servants, 38.

Private carrier for hire may stipulate against liability for, 40.

Common carrier—

Common carrier under contract for through carriage cannot stipulate for exemption from liability for losses from negligence, 240.

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—*Common carrier*—con.

Explosion of boiler presumed to be from negligence, 281.
Carrier not excused even though loss occurs through act of God if he negligently venture forth from place of safety, 288.

Or if he negligently exposes the goods to danger, 292.

Carrier liable for loss by capture by public enemy caused by his own negligence, 319.

Effect of shipper negligently performing his undertakings in respect to carriage, 333.

But if loss would have occurred through carrier's negligence, notwithstanding owner's fault, carrier will be liable, 333.

Though injury caused by peculiar nature of live animals, carrier not excused if he has been negligent, 342.

Carrier liable for injuries to animals through negligent exposure to cold, 342, note 1.

Vessel liable for negligent loading or stowage under Harter Act, 350-361.

Gross negligence of master will raise presumption of negligence in his selection, 381.

Under Carriers' and Railway and Canal Traffic Acts in England carrier may stipulate against liability for loss by negligence, 397.

But language to relieve from negligence must be express, 398.

Carrier not excused though loss occurs through excepted cause if he negligently exposes the goods to danger, 420.

Contracts limiting liability to fixed amount without regard to value of goods of no avail in case of negligence of carrier or his servants, 425, 431.

But contract fixing a *bona fide* valuation is valid even though loss occurs through carrier's negligence, 426.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable as for a conversion for full value of goods, and not stated value, 432.

In America, weight of authority against permitting carriers to exonerate themselves from consequences of negligence by contract, 450, 453.

All courts agree that if exemption from negligence be permitted, exemption must be express and will be construed against carrier, 450.

The rule of the United States Supreme Court, 452.

[REFERENCES ARE TO SECTIONS.]

NEGLECT—*Common carrier*—con.

Contrary rule prevails in New York, 454.

Rule in Illinois, 455.

Stipulation as to amount of proof required amounts to limitation as to negligence and is void, 456.

Carrier liable notwithstanding exemption if the loss be the result of his negligence, 477.

Carrier liable, notwithstanding exception against perils of sea when loss caused by negligence, 492.

When defect in vehicle can be traced to carrier's negligence, he cannot protect himself by contract, 497.

Prima facie case of negligence when goods injured by spark from engine, 503.

When failure to provide fire extinguishers is negligence, 504.

Defect in coupling is negligence, 504.

Effect of shipper's knowledge of negligent stowage, 602, note 18.

If usage to carry salt as part of cargo of general ship, not negligence to take it on board with other goods, 606.

Negligence to take goods on board in such condition that they will injure other goods, 606.

Initial carrier liable for negligence in care of live stock although injury develops on line of connecting carrier, 634.

Negligence in management of cars containing live stock, 639.

Failure of shipper of live stock to furnish caretaker does not excuse subsequent negligence of carrier, 642.

Carrier liable for his negligence in loading or unloading stock notwithstanding contract that shipper shall do so, 643.

Same rule true as to shipper, 643.

Mere delay usually no evidence of negligence, but fact of delay supplemented by proof of cause may show negligence in transportation, 651, and notes.

Carrier liable for negligence in delivery to wrong person, 668, *et seq.*

Carrier liable for negligence in delivery, even though holding goods as warehouseman, 681, note 47.

Railroad company liable for negligence in misleading consignee on arrival of goods, 709.

Passenger carrier—

Negligence in operation of passenger elevators, 100, 101, 102.

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—*Passenger carrier*—con.

Proof of negligence essential to recovery against passenger carrier, 892.

Care and circumspection to be used by, 893-897.

Passenger carrier by steam, 898.

Negligence in operation of freight or mixed trains, 899.

Carrier not liable for mere accidents or casualties which human prudence could not foresee, 900.

Responsibility for latent defects in vehicles, 903-905.

Responsibility for defects in vehicles attributable to fault of manufacturer, 906-908.

Responsibility for defects in bridges, 910.

Liability of carrier for unsafe appliances in vehicle, 911.

Liability of carrier for defective seat in vehicle, 911.

For defective fastening on window, 911.

For defective doors, 911.

For misplaced coupling pins, 911.

For defective berths, 911.

For defective halyards, 911.

For defective ladders on freight cars, 911.

For engines out of repair, 911.

For upright iron flanges on car platform, 911.

For unguarded openings on deck of vessel, 911.

Responsibility of carrier for injuries caused by escaping sparks or cinders, 912.

When carrier liable although the immediate cause of the injury is the negligent act of a third person, 913.

Carrier liable if his own negligence concurs in any degree, 913.

Liability of carrier where injury is due to an intervening cause, 914.

Negligence in railway company to leave passenger helpless on track, 914.

Carrier liable when injury results from defects in roads of another company over which he runs his vehicle, 915.

Same rule applies where track runs over public bridge, 915.

Carrier liable for injury from leaving hatchway open in hulk used by him in embarking passengers, 916.

Where stage owner uses ferry, liable for negligence of ferry company, 916.

Carrier liable for negligent operation of sleeping car employed by it but owned by another company, 916.

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—*Passenger carrier*—con.

Liability for injury caused by concurrent negligence of two carriers, 917.

When railroad company liable for negligence of lessee, 918.

Liability for negligence of independent contractor, 919.

Liability of carrier for negligence of other passengers in bringing articles into vehicles, 920, 921.

When carrier liable for negligence in furnishing insufficient accommodations in vehicle, 922.

Railroad company must exercise the highest degree of care and diligence in respect of management and running of vehicles, 923.

Liable if it so carelessly manages its trains that a collision ensues, 923.

Liable if statutory requirements as to making up train or stopping are not complied with, 923.

When leaving wounded animal near track is negligence, 923.

When operation of train with locomotive in the rear is negligence, 923, note 18.

When running of a freight train between passenger train and station is negligence, 923, note 18.

When failure to give proper signals is negligence, 923.

When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.

When failure to have a proper and fit telegraph line for running trains is negligence, 923, note 23.

Carrier liable for negligence of engineer in failing to discover animal on track, 923.

Carrier liable for negligent collision of ferry-boat with dock, 923.

If violent storm drives freight train back on passenger track, servants of railroad company must exercise proper diligence in flagging passenger train, 923, note 24.

Carrier must exercise high degree of care to avoid sudden jerks and jars, 924.

Negligence to make a running switch, 924.

Carrier liable for injuries from jerks or jars resulting from use of too small an engine, 924.

But carrier not liable for injuries from jar caused by fellow-passenger inadvertently setting emergency brake, 924, note 27.

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—*Passenger carrier*—con.

Liability of railroad company where stone, attached to derrick, is swung into passing train, 925.

Or where it permits gravity road to be used in connection with its track, 925, note 32.

When railroad company negligent in failing to look out for cattle or other animals upon track, 925, note 32.

Running railroad train at high speed not of itself negligence, 926.

But attending circumstances may make it negligence, 926.

Consideration should be given to the character of the train, condition of road-bed, sharpness of curves, etc., 926.

When carrier liable for excessive speed although passenger was standing on platform of car, 926, note 26.

Nothing can justify running train at high speed over track known to be in a dangerous condition, 926, note 26.

When effort to make up lost time is negligence, 926, note 26.

Injury to passenger from sudden closing of door or window, when negligence, 927.

In absence of custom, not negligence in carrier to fail to provide entrance to train by express or baggage cars, 927.

If vestibules provided on train, carrier negligent if they are not kept in repair, or are needlessly left open, 927.

Not negligence to open side and floor door as train approaches station, 927, note 8.

Negligence in providing stational accommodations, 930.

Negligence in maintaining or repairing retiring places, 931.

Missing train through negligence of agent, 931, note 24.

Negligence as to roads, 947, *et seq.*

As to improvements to promote safety of passenger, 952, *et seq.*

As to examination of vehicle and other apparatus, 956, *et seq.*

As to character of servants, 958, *et seq.*

In protection of passenger, 980, *et seq.*

As to trespassers, 990.

As to persons assisting passengers, 991.

As to passengers under disabilities, 992, *et seq.*

Contract exempting from liability for negligence to passengers, void, 1072, *et seq.*

Except when on free pass, 1076.

Negligence in expelling passenger from vehicle, 1082, *et seq.*

[REFERENCES ARE TO SECTIONS.]

NEGLIGENCE—*Passenger carrier*—con.

In not conforming to schedule and notices, 1104, *et seq.*

Detention of passenger caused by, 1109.

In starting train without warning, 1111, 1118.

In failure to give notice of arrival at stations, 1121, 1122.

In inviting passenger to alight at unsafe place, 1122.

In passing beyond platform or station, 1126.

Negligence in loss of baggage, see BAGGAGE.

Presumptions as to negligence, see PRESUMPTIVE EVIDENCE.

Contributory negligence, see CONTRIBUTORY NEGLIGENCE.

Passenger guilty of, in attempting to alight from train while in motion, 1177.

View that attempt by passenger to alight from train while in motion is not necessarily a negligent act *per se*, 1179.

Passenger guilty of, in attempting to board train while in motion, 1181.

View that attempt by passenger to board train while in motion, not necessarily a negligent act *per se*, 1182.

Property not owned by passenger, carrier not liable to owner for loss of, unless guilty of, 1276.

Baggage lost through negligence of passenger, carrier not liable, 1260, 1264.

Sleeping-car company, not liable for loss of baggage unless guilty of, 1131, 1273.

Sleeping-car company, not liable for baggage lost through negligence of passenger, 1132.

NEGOTIABILITY—

Of bills of lading, 175, *et seq.*

NERVOUS SHOCK—

Where so great as to cause bodily injury, it may be considered as an element of damage, 1427.

NEW ROAD—

Effect of passenger knowingly accepting passage over a new road not yet open for traffic, 900, note 25.

NEWS AGENTS—

Duty of passenger carrier towards, 1018, 1073.

NEWSPAPERS—

Preference in the carriage of newspapers unlawful, 512, note 59.

Publication of notice of arrival by carrier by water in newspapers insufficient, 690.

[REFERENCES ARE TO SECTIONS.]

NITROGLYCERINE—

Carrier not bound to accept for carriage, 145, note 3.

NOMINAL DAMAGES—

Shipper entitled to, where no difference in value of goods when they should have arrived and when they did in fact arrive at destination, 1366, note 31.

NON-DELIVERY—See DELIVERY.

NON-FEASANCE—

Mandatory not liable for, 34.

NOTICE—

In general—

To carrier of delivery to him, 117.

Knowledge of carrier's agent equivalent to notice, 121.

Passenger carrier not liable for baggage left at usual place without notice of owner's intent to become passenger, 127.

Consignor or consignee must be notified of refusal of succeeding carrier to receive goods, 132.

Rule as to notice where goods are perishable, 132.

Carrier may by notice relieve himself of obligation to carry particular kind of goods, 144.

By common law in England carrier could limit his liability without express contract by public notice, 390-392.

In America, carrier cannot limit liability by public notice or notice to bailor, 399, 406, 411.

Distinction between notices limiting common-law liability and those restricting business to particular routes, classes of goods, etc., except on certain conditions, 414.

Notices of latter class binding on shipper, 414.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432.

Shipper is bound to disclose value of goods after notice that carrier will be liable only to a limited amount unless value is disclosed, 437, 438.

Notice under English Land Carrier's Act, 439, 440.

Where carrier gives two notices, he is bound by one least beneficial to himself, 464.

In accepting goods, carrier must inform shipper of necessary delay, 495, 496.

And when bound to carry to destination, must inform shipper of delay on connecting route, 496.

[REFERENCES ARE TO SECTIONS.]

NOTICE—*In general*—con.

Notice not to carry in hold must be called to attention of carrier, 605, note 29.

Shipper must be notified before carrying by dangerous or unsafe route, 614.

Notice to carrier of shipper's omission to furnish caretaker for live stock is essential to charge him with liability when contract provides otherwise, 642.

Shipper should receive notice from carrier of delay through strikes, mobs or riots, 657, note 42.

What necessary to charge shipper with notice that goods have been billed to wrong place, 680.

Effect of loss of notice of arrival sent to consignee by carrier and required to be produced before delivery, 668, note 13.

Carrier by water—

Carrier by water must land goods at wharf and notify consignee or owner, 687.

Must give notice of arrival and allow reasonable time for removal, 689.

When notice must be actual, 690.

Publication in newspaper insufficient, 690.

Notice to clerk, 690, note 15.

Notice to consignee's wife, 690, note 15.

Notice by mail, 690.

Custom to notify by mail valid, 690.

Notice of arrival of goods must be given to consignee, if he can be found by reasonable diligence, 695.

Cannot warehouse goods without due effort to find consignee, 695.

Unless proper effort to find and notify consignee be made, carrier still liable as such for safety of goods, 695.

Necessity of notice may be waived by usage, 696.

Usage may be long continuance of same course of business with one consignee, or the uniform usage and course of business of carriers in the same trade in which he is employed, 696.

Necessity of notice may be dispensed with by contract, 697.

At what wharf delivery must be made, 698.

Railway Companies—

In case of railway companies, conflict of authority exists as to whether notice of arrival of goods to consignee is necessary, 702, *et seq.*

[REFERENCES ARE TO SECTIONS.]

NOTICE—*Railway companies*—con.

Cases exempting railway companies from duty of notifying consignee of arrival of goods, inconsistent with general rules of law governing delivery by carriers, 707.

No substantial reason for such exception, 707.

New York rule as to delivery requires notice if consignee is not present, 708.

Question of notice becomes immaterial when goods have, in fact, reached their destination, and railroad company, on demand, claims they have not arrived, 709.

Actual knowledge of consignee of arrival of goods sufficient, 709.

Notice unnecessary where address of consignee is unknown, and due diligence used to find him, 709.

Effect of usage on consignee's right to notice of arrival, 710.

Custom not to give notice on Fourth of July valid, 710.

Express Companies—

Notice by express companies to consignee, 716, *et seq.*

Sufficiency of postal card notice in small village, 717, note 12.

When notice required of carrier for protection of goods—

Whether carrier who is bound to make a personal delivery must give notice of a refusal of the goods by consignee, is a question involved in conflict of authority, 720.

Such notice has been held unnecessary, 720.

Better opinion, notice to consignor in such case is necessary, 721.

If consignee owner, notice of storing goods should be given to him, 721.

Carrier not required to give notice where consignee has done so, 721.

Effect of carrier holding goods without giving notice to consignor on consignee's promise to pay, 721, 722.

Carrier not liable as for conversion in failing to give notice of refusal of consignee to receive the goods, 721, note 21.

When consignee absent, or after reasonable diligence cannot be found, and carrier knows in any way that goods belong to consignor, his duty to notify latter, 724.

Duty of carrier to give notice to consignor of absence of consignee, or of his refusal to accept the goods, only arises when personal delivery required, 725.

Rule has no application to railway companies, 725.

[REFERENCES ARE TO SECTIONS.]

NOTICE—*When notice required of carrier for protection of goods—*
con.

Carrier not liable for omission to give notice unless loss attendant upon such omission, 725.

On refusal of consignee to accept C. O. D. goods, carrier not compelled to return, but may notify consignor and await orders, 729.

Carrier must give prompt notice to consignor or owner of seizure of goods under legal process, 743.

Carrier by water must defend suit till owner notified, 744.

Carrier should notify shippers when goods are detained by customs officers, 755.

Carrier should communicate with owner of goods before selling them when practicable, 792.

When goods dangerous in transportation, duty of shippers to make known such fact, 796.

Stoppage in transitu—

Simple notice to carrier sufficient, 758.

May be given by general agent of vendor, 759.

Cannot be by stranger, 759.

Should be to person in possession of goods, 760.

If to employer or agent, opportunity should be given to notify person in actual possession, 760.

After notice to carrier, vendor constructively in possession, 772.

Demurrage—

Necessity of notice of vessel's readiness to receive cargo in order to render consignee liable for demurrage, 848.

Lay days do not begin to run until such notice given, 848.

Vessel must be ready and at her proper place for loading before notice can properly be given, 848.

In England, master not bound to notify charterers or consignees of arrival of goods, 848.

But in the United States, notice to the charterers or consignees is necessary, even at port of discharge, 848.

Lien for freight—

When notice of non-abandonment of lien by master will preserve it, 869, note 37.

Passenger carrier—

When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.

Forbidding passengers to ride upon platform of car, deemed

[REFERENCES ARE TO SECTIONS.]

NOTICE—*Passenger carrier*—con.

waived when passengers received, and there is not sufficient room inside, 1198, note 39.

When carrier will be charged with, that trunk or closed package contains merchandise, 1250.

Carrier must have, of special circumstances requiring expedition in shipment, before he can be held liable for special damages, 1367.

NOTICE TO CONSIGNEE—

Of arrival of goods, necessity for, by carrier by water, 689, *et seq.*

By railroad companies, 702, *et seq.*

By express companies, 716, *et seq.*

NOTICE TO CONSIGNOR—

That consignee refuses goods, 720-722.

Or is absent or cannot be found, 723-725.

“NUMBER UNKNOWN”—

Effect of clause in bill of lading that “number” is “unknown,” 165.

NUTS—

Damage to, through coal dust, 609.

Damage to, through disregarding directions, 611.

OBSCENE LANGUAGE (see INSULTING LANGUAGE)—

Ejection of passenger for, 978, note 36.

OBSTRUCTIONS (see SNAG)—

When hidden obstructions are perils of the sea, 486.

If one of usual routes obstructed, carrier must transport by other, 614.

Duty of passenger carrier to keep track clear from obstructions, 925.

Duty to avert injury from obstruction placed near track, 925.

Railroad bound to keep platform of station free from obstructions, 935.

Every indulgence of carrier in permitting objects to remain on station platform not necessarily negligence, 935.

OCEAN LINES—

Competition of ocean lines should be considered under Interstate Commerce Act, 562.

OFFER AND ACCEPTANCE—

Offer to carry freight for a certain rate may be withdrawn before acceptance, 804, note 30.

[REFERENCES ARE TO SECTIONS.]

OFFICER—

Ejection of, with prisoner, 976.

OIL—

Improper stowage of, 354, note 24, 355, note 26, 27.

Carriage of oil on open car, 506, note 40.

Loss of oil through leakage, 632.

Accumulation of oil on station platform, 935.

OLIVE OIL—

Stowage of, 606, note 31.

OMNIBUS—

Proprietor of, when a common carrier, 68.

Person giving proper signal for omnibus to stop in attempting to board vehicle is a passenger, 1005.

But circumstances must show express or implied invitation of carrier, 1005.

ONUS PROBANDI (see BURDEN OF PROOF; EVIDENCE).

OPEN CARS—

Duty of carrier in use of, 506.

Directions of shipper as to use of open or closed car must be followed, 611.

OPERA GLASSES—

When baggage, 1246.

“OPERATING EXPENSES”—

Earnings cannot be transferred at will into “operating expenses” to justify unreasonable rate, 584.

OPERATION—

Of passenger trains, 923, *et seq.*

OPTION—

Shipper must be allowed real freedom of choice between restricted or common-law liability, 404.

If two routes usual, carrier may select, 613.

Absence of special instructions gives carrier choice, 613, note 53.

If one of such routes has become unsafe from accidental or temporary cause, must transport by the other, 614.

Option as to routes must be exercised with regard to shipper's interest, 615.

When charterer given option in choice of berth, 850.

[REFERENCES ARE TO SECTIONS.]

ORANGES—

Carrier liable for improper stowage of oranges, 383, note 2.

Carrier liable for carrying by dangerous route and exposing oranges to frost thereby, 614.

Effect of general words permitting deviations used in a printed form of charter party by owners of vessel carrying oranges, 622.

OVERCHARGES—

Recovery of, at common law, 521, 1341.

Recovery of, under Interstate Commerce Act, 537.

Rates, illegal under state statutes, may be recovered back, 574, 589.

Right of consignee to recover back overcharges, 805.

Right of consignee when excessive demurrage demanded, 855.

OVERLOADING—

Where vessel to proceed to berth "as ordered," demurrage not allowable where vessel cannot reach designated berth on account of overloading, 850.

OWNER—

Carrier's right to freight where the goods are carried contrary to the wishes or directions of the owner, 827.

Whether carrier has lien on goods wrongfully shipped by one who is not owner, 882-884.

Rights of connecting carrier no better in this respect than those of initial carrier, 884.

Owner may sue for damage to goods, 1306.

OWNERSHIP—

Ownership of means of transportation not essential to constitute a common carrier, 84.

Carrier not excused because defective vehicles used by him are owned by another, 498.

Carriers forbidden in section one of Interstate Commerce Act to transport property owned by them and not intended for their own use, 523.

Bailor may countermand any directions as to consignment so long as he remains owner of the goods, 660.

Effect of ownership of goods on carrier's duty to give notice of a refusal of consignee to receive goods, 721.

Consignee presumed to be the owner of the goods, 175, 735.

Duty and liability of the carrier when adverse claim is set up to the property, 749-756.

[REFERENCES ARE TO SECTIONS.]

OWNERSHIP—con.

When ownership of vehicle of passenger carrier is immaterial, 916.

When ownership of station facilities is immaterial, 937.

“OWNER’S RISK”—

Carriage of horses at owner’s risk, 397, note 16.

Meaning of “owner’s risk,” 463, 504.

Effect of “owner’s risk” exemption on carrier’s duty to unload live animals, 510, note 52.

Protection of such a limitation will not extend to additional voyage arbitrarily made by order of vessel owner, 613, note 52.

PACKAGES—

Carrier may refuse to accept as passenger one carrying packages of merchandise, 967, note 17.

Too large to be carried in lap, regulation that passenger with, shall pay extra fare, reasonable, 1077, note 17.

Of merchandise, regulation that passengers with, shall not be admitted to cars, reasonable, 1077, note 17.

Contents of, when carrier liable for, as baggage, 1250.

Carrier not liable for contents of, where same not properly baggage, unless he accepts them with knowledge of what they contain, 1250.

Mere external appearance of, not sufficient to charge carrier with knowledge of contents, 1250.

Carrier not required to make inquiry as to contents of, 1250.

Knowledge by carrier of contents of, may be inferred from general custom or manner of doing business, 1250.

May be inferred from circumstances, 1250.

PACKAGE FREIGHT—

Ordinarily unloaded by railroad company, and not by party entitled to it, 711.

PACKING—

Carrier may refuse to accept goods insufficiently packed or in an unfit condition for carriage, 145.

Carrier may show that loss was due to unskilful or improper packing, 163.

Appearance of package may amount to misrepresentation as to its contents, 330.

Effect of unskilful packing by shipper, 333.

PANIC—

Injury to passenger during panic of fellow-passengers, 900.

[REFERENCES ARE TO SECTIONS.]

PARENT—

Right of action for injury to child, 1377, *et seq.*

Effect of child's negligence upon parents' action, 1381.

Effect of parents' negligence upon his own action, 1382.

PARLOR-CAR COMPANIES (see SLEEPING CAR COMPANIES).

PAROL CONTRACT—

Parol contract of carriage sufficient, 152.

Effect of subsequent parol agreement on obligations of prior bill of lading, 170.

Effect of delivery of bill of lading after oral contract of shipment made but before shipment has begun, 171.

How when goods shipped under parol contract before bill of lading delivered, 172, 417.

How when it is the custom for the carrier to issue bill of lading after goods shipped or to give only temporary receipts, 173.

Acceptance of bill of lading after oral agreement made to furnish cars at certain time, 174.

Contract containing limitations of carrier's liability need not be in writing, 411.

Unsigned bill of lading may be evidence of the contract actually made, 411, note 3.

Verbal contract of shipment entered into by station agent will ordinarily bind carrier, 462, note 19.

C. O. D. contract with carrier may be verbal, 728.

PAROL EVIDENCE—

Admissible to contradict, vary or explain bill of lading as a receipt, 158.

Inadmissible to vary terms of contract contained in bill of lading, 167.

But ambiguity may be removed by parol evidence, 167.

Implied obligations of bill of lading cannot be varied by parol, 168, 169.

Parol evidence is admissible to prove terms of subsequent parol agreement which changes or modifies written contract, 170.

Ordinarily parol evidence is inadmissible to vary express valuation of goods in contract, 428.

But parol evidence admissible where valuation is ambiguous, or on question of owner's assent, 428.

Parol evidence not admissible to vary obligations of a "clean bill of lading," 603.

[REFERENCES ARE TO SECTIONS.]

PAROL EVIDENCE—con.

Rates for carriage fixed by contract, not alterable by parol evidence, 804.

When parol evidence inadmissible to dispute right of shipper to recover freight paid in advance, 830, note 40.

If ticket does not express entire contract, parol evidence admissible, 1052.

PARTIAL DELIVERY—

Effect of, on carrier's lien, 870.

Partial delivery will not be taken as constructive delivery of whole, or as waiver of lien, unless parties so intended, 870.

Intention of parties a question of fact, 870, note 42.

Carrier cannot insist on payment of freight by parcels, 870.

Rule different in England, 870, note 43.

PARTIAL LOSS—

Measure of recovery on an agreed valuation where the loss is only partial, 429.

PARTIES—*In general—*

Subject to Interstate Commerce Act, section one of act 523, 524.

Consignor and consignee accepting goods, both liable for the freight, 799.

Who may sue for loss of or damage to goods—

Presumption that consignee is owner and has right to sue, 1304.

But this presumption not conclusive, 1304.

Question at whose risk goods are sent will usually determine question who is proper person to sue, 1304.

Recovery by person who takes no risk in transportation, no protection to carrier against recovery by owner, 1304.

Mere servant or agent with whom contract is made, who has no interest in transaction, cannot sue, 1305.

One having special property in goods may sue, 1305.

Factor, intrusted with goods, may sue for damage done them, 1305.

Warehouseman, intrusted with goods, may sue for damage done them, 1305.

Owner may sue, 1306.

Although contract for carriage made by agent, principal may sue, 1306.

[REFERENCES ARE TO SECTIONS.]

PARTIES—*Who may sue for loss of or damage to goods—con.*

Either general or special owner, or both of them, may sue, 1306.

But recovery by one will bar subsequent suit by other, 1306.

And satisfaction as to one will be satisfaction as to both, 1306.

Person making contract with carrier may sue, 1307.

Interest in goods not necessary to enable person making contract with carrier to sue, 1307, 1308.

Consignor, without interest in goods, may sue, although contract of shipment be oral, 1308.

States which follow doctrine that person making contract with carrier may sue, although he have no interest in goods, 1309.

This doctrine supported by English cases, 1310.

Advantages of rule that person making contract, although without interest in goods, may sue, 1311.

Recovery by consignor having no interest in goods inures to benefit of owner, 1311.

Contract need not be in writing to enable shipper to sue, 1313.

Whenever carrier accepts goods of consignor, the latter may sue for loss or damage thereto, without regard to ownership, 1314.

But consignor, when not owner, must sue on contract, 1314.

Action in tort can be maintained only by real owner, 1314, note 22.

Contingent right of stoppage *in transitu* not sufficient interest in goods to entitle consignor to sue in tort, 1314, note 22.

Rule that only owner can sue, 1315.

Right of stoppage *in transitu* not sufficient interest in goods to entitle shipper to sue, 1315.

Mere agent without interest cannot sue in tort, 1316.

If consignor mere agent of consignee, he cannot sue, 1316.

When consignee may sue, 1317.

When consignor in shipment of goods has obeyed the instructions of consignee, latter may sue, 1317.

In such cases, title to goods will pass to consignee on their delivery to carrier, 1317.

When consignor has obeyed instructions of consignee, latter may sue either upon the contract or for a breach of duty, 1317.

But question whether title to goods has passed to consignee by

[REFERENCES ARE TO SECTIONS.]

- PARTIES**—*Who may sue for loss of or damage to goods*—con.
 a delivery to carrier will depend on intention of parties, 1317.
 And this may always be shown, 1317.
 If goods destroyed in transit, and consignee purchases them from owner, consignee may sue in own name, 1317.
 And fact that goods are destroyed before consignee's purchase will make no difference, 1317.
 If consignee refuse to receive goods under a mistake, he may sue for a refusal to deliver when a subsequent demand is made, 1317.
 When consignor proper party, 1318.
 When consignor ships without instructions, he is proper party to sue, 1318.
 Where goods sent to consignee merely for purpose of approval, consignor proper party to sue, 1318.
 Where consignor agrees to deliver goods at particular place to which they are consigned, he is proper party to sue, 1318.
 Where consignor has directed carrier not to make delivery until price is paid, he is proper party to sue, 1318.
 Where consignor has shipped goods conditionally, he is proper party to sue, 1318.
 If sale is void for fraud or non-compliance with statute of frauds, title remains in consignor, and he is proper party to sue, 1319.
 If consignee refuse to receive goods because of injury to them while in carrier's possession, consignor proper party to sue, 1319.
 Where risk of transportation is upon consignor, he considered owner for purpose of maintaining action, 1320.
 Person making contract with carrier may sue on same, whether he have any interest in goods or not, 1320.
 Law will presume that consignee is owner and therefore entitled to sue, 1320.
 But this presumption may be rebutted, 1320.
 Consignee who has no interest in the goods, and who has incurred no risk, cannot sue, 1320.
Common-law actions for personal injuries—
 In actions for personal injuries against carriers of passengers, *lex loci delicti* governs, 205.
 Contributory negligence governed by same law, 205.
 Proof of *lex loci delicti* must be made, 205.

[REFERENCES ARE TO SECTIONS.]

PARTIES—*Common-law actions for personal injuries*—con.

At common law, right to sue for injury confined to passenger, 1376.

In case of death of person injured, right to sue at common law did not survive to personal representatives, 1376.

But if person injured stood in relation of servant to plaintiff, plaintiff could sue for loss of services, 1376.

Recovery by master limited to his pecuniary loss, 1376.

Parent's right of action, 1377.

Parent has right of action for injury to minor child, 1377.

But recovery will be limited to injury sustained by loss of child's service, 1377.

Mere relation of parent and child, without evidence of service, not sufficient to confer right of action upon parent, 1377.

Mere contract between parent and son, by which parent received portion of son's monthly earnings, not sufficient evidence of service, 1377.

Husband cannot recover, in action for loss of service of wife, damages for loss of prospective offspring, 1377, note 3.

Nature and extent of recovery, 1378.

Greater latitude allowed in recovery by parent in America, 1378.

Parent may recover not only for loss of service of child, but for expense of sickness of wife caused by nervous shock resulting from negligent killing of son, 1378.

Parent may recover for distress of mind occasioned by child's death, 1378.

Parent may recover for child's funeral expenses, 1378.

Parent may recover for medical expenses, 1378.

And this without reference to capacity of child to render service, 1378.

Parent may recover not only for loss up to time of trial, but also for prospective loss, 1378.

Where injury maliciously inflicted, parent may recover punitive damages, 1378.

Expenses of child's support during minority should be considered, 1378.

Father dead, mother may recover for loss of services of unemancipated child, 1378.

Also for nursing and medical attendance, 1378.

Husband's right to recovery for injury to wife at common law, 1379.

[REFERENCES ARE TO SECTIONS.]

PARTIES—*Common-law actions for personal injuries*—con.

Husband may recover for loss of service and society of wife, 1379.

Also for expenses incurred, 1379.

Husband's right of action for injury to wife not extinguished by her death, 1379.

Nor by death of child or servant, 1379.

Where, by statute, fruits of wife's earning capacity belong to her, husband can recover only for loss of domestic services, 1379.

Where wife rendering voluntary service to husband in his business, he may recover for loss of such service, 1379.

Husband may recover value of his services while acting as nurse for his wife, 1379, note 13.

Relation of servitude necessary at common law, 1380.

Wife, child or servant, therefore, had no right of action for injury to husband, parent or master at common law, 1380.

Effect of child's contributory negligence on parent's action, 1381.

Effect of parent's negligence on his own action, 1382.

Effect of negligence of husband or wife on the other's action, 1383.

Where action is brought for joint benefit of husband and wife, negligence of wife attributable to husband, 1383.

Where action is for loss of services or society of wife, contributory negligence of either will defeat action, 1383.

Statutory actions—

See LORD CAMPBELL'S ACT.

PARTNERSHIP—

Where copartnership exists between carriers, initial carrier cannot limit his liability to his own line, 240, note 24.

Individuals and corporations may be partners as carriers, 249.

In such case, jointly liable, 249.

Proprietors of stage lines employing drivers for different sections of road, and dividing profits and losses, are partners, 249, 250.

Otherwise, when each bears expenses and receives profits of his own section, one acting as agent for collection of fare for others, 250.

Or where there is mere division of gross receipts, 250.

Partnership not necessary to joint liability, 251.

Arrangements for carriage between connecting lines sometimes create joint liability, and sometimes do not, 251.

[REFERENCES ARE TO SECTIONS.]

PARTNERSHIP—con.

Proprietors of connecting stage lines each responsible for misconduct of driver jointly employed, 252.

Goods lost on wharf-boat of association of carriers, liability joint and several, 253.

Liability of associated railways for lost freight, 254.

Liability of associated railways for lost baggage, 255.

When railroad and steamship companies are not jointly liable, 256, 257.

No joint liability when separate tickets sold by common agent, though all the tickets equivalent to one through ticket, 258.

Nor by similar contracts being entered into by several railroads with same dispatch company, 259.

Nor when common agent collects fare for two or more connecting carriers, 260.

Carrier selling ticket to passenger to go beyond his own line, liable for fault of connecting carrier, 261.

Effect of establishing joint or through rates, 262.

Contract for division of freight in certain proportions renders carriers liable as partners, 263.

Where each bears expenses of his own route, and profits divided according to distances or otherwise, not partners *inter se*, or as to third persons, 263.

Railroad companies and other incorporated associations may become partners at least to third persons, 264. *

Agents of each associated carrier have authority to bind the other carrier, 462, note 19.

PARTY RATES—

Under Interstate Commerce Act, 543.

PASS (See FREE PASS)—

Riding on pass as a "visitor," 1001, note 11.

Person traveling fraudulently on free ticket of another can recover only for gross negligence, 1001.

When pass not gratuitous, 1073.

PASSENGER—

In general—

Risks which passenger takes upon himself, 900.

Passenger must exercise at least ordinary care for his own safety, 962.

Duty of carrier to accept, 962, *et seq.* .

Whom carrier may refuse to accept, 966, *et seq.*

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*In general*—con.

Right to be carried on freight train, 964.

Separation of, for color, sex, etc., 972, 973.

Ejection of passenger for misconduct, 974, *et seq.*

When one passenger may be ejected for misconduct of another, 976.

Protection of, duty of carrier as to, 980, *et seq.*

Fare and its payment, 1023, *et seq.*

See FARE.

Tickets of passengers, duty to procure, and effect of, 1028, *et seq.*

See TICKETS.

Must conform to reasonable regulations, 1077, *et seq.*

See REGULATIONS.

May be ejected for refusal, 1077, *et seq.*

See EJECTION.

Treatment due to, 1093, *et seq.*

See ASSAULT; SERVANTS.

Diligence in transportation of, 1103, *et seq.*

Duty to stop trains at stations to receive, 1110.

Duty to allow passenger reasonable opportunity to enter vehicle in safety, 1111.

Helping passengers to enter train, 1112.

Passenger entitled to sufficient room and accommodations, 1113.

Right of passenger to a seat, 1113, 1114.

Carrying passengers in baggage car, 1115.

Allowing passengers customary intervals for refreshments, 1116.

Passenger must be put down at usual place of stopping, 1117.

Must be given sufficient time to alight, 1118, 1119.

Evasion of fare by passenger, 1120.

Must be given notice of arrival at stations, 1121.

But personal notice usually not necessary, 1121.

Must not be invited to alight at improper time or place, 1122.

Calling name of station not sufficient to justify passenger in thinking train has arrived at station, 1123.

Effect of notice to passengers to take other cars, 1125.

Carrying passengers past platforms or stations, 1126.

Helping passengers to alight, 1127.

Awakening sleeping passengers, 1128.

Furnishing passengers necessary instructions, 1129.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*In general*—con.

Contributory negligence of passengers, 1170, *et seq.*

See CONTRIBUTORY NEGLIGENCE.

Passenger's baggage.

See BAGGAGE.

Who are passengers—

Impossible to frame definition of "passenger" embracing all essential elements, 997.

Every person, not an employe, being carried with express or implied consent of carrier upon a public conveyance is presumed to be lawfully upon it as a passenger, 997.

Presumption does not extend to private vehicles, such as to a brewer's wagon, 997, note 44.

Persons borrowing engine and car for their own use are not passengers, 997, note 44.

Undertaking on part of person to travel in conveyances provided by carrier essential to constitute a passenger, 997.

Acceptance by the carrier of the person as a passenger also essential, 997.

Acceptance by carrier may be implied from surrounding circumstances, 997.

If train be fitted for carriage of passengers, and placed in position where persons are induced to enter as passengers, carrier must show they had notice it was not intended for their use, 997.

On vehicles palpably designed for carriage of passengers, presumption exists of authority of carrier's employes to create relation of passengers, 998.

This presumption not conclusive, 998.

Presumption exists even in favor of employe of railroad company riding in passenger coach at invitation of yardmaster, 998.

One accepted by conductor on special excursion train is passenger, 998, note 47.

Engineer ordinarily has no right by his invitation to create passengership relations, 998, note 47.

Persons intending to become passengers presumed to know they must enter coaches set apart for passengers, 999.

Trespassers if, without inquiry, they go upon baggage, mail or express cars, 999.

No presumption that person riding on vehicle not intended for passengers is passenger, 1000.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*Who are passengers—con.*

Riding on freight train, 1000.

Riding on locomotive of train, 1000.

Riding upon engine cab, 1000.

Or upon hand-car, 1000.

Or upon stone, work or construction train, 1000.

Or upon baggage wagon of omnibus or transfer company, 1000.

Person upon conveyance by fraud, or against express orders of carrier, not a passenger, 1001.

Person fraudulently evading payment of fare not a passenger, 1001.

Person claiming to be passenger must be lawfully on train, 1001.

Riding on pass as a "visitor," 1001, note 11.

When testimony of railroad company's auditor is competent as to whether person was a passenger and his ticket had been taken up by certain conductor, 1001, note 11.

Attempt at evasion of fare will not deprive person of right to enter passenger car and pay fare, 1001, note 11.

Person traveling fraudulently on free ticket of another can recover only for gross negligence, 1001.

Passengership relation not entered into by child entering car to play, 1001.

By person who steals ride on engine, 1001.

By person riding in mail car without right or knowledge of carrier's servants, 1001.

By person riding clandestinely on steps of car, 1001.

By person climbing into caboose without ticket or fare, 1001.

By person attempting to "dead head" or "beat" his way, 1001.

By person riding on freight train with knowledge of express rules of carrier to the contrary, 1001.

By person entering into collusive arrangement with the conductor, brakeman or other employe, even though sum of money paid, 1001.

Passenger by mistake on wrong train is not a trespasser, 1002.

Should be carried to place reasonably safe and convenient to get upon proper train, 1002.

Person getting on train in good faith with supposedly proper ticket is not a trespasser, 1002.

But duty of railroad company ceases when person on wrong

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*Who are passengers*—con.

- train voluntarily leaves train at place other than a station, and proceeds along railroad track, 1002, note 26.
- Person riding on "drover's pass," entitled to protection as passenger, 1003.
- Attempt to limit authority of carrier's agent by requiring him to impose limitation of liability void, 1003, note 29.
- Effect of limitation of carrier's liability to his own line in contract, but not in "drover's pass," 1003, note 29.
- Person traveling on "drover's pass" not charged with knowledge of limitation of carrier's liability contained in contract between shipper and carrier, 1003, note 29.
- Carrier by water liable to one carried on boat for purpose of caring for live stock for negligence in lighting boat, 1003, note 29.
- Status of person traveling on "drover's pass" not changed by recital in contract that he is an employe of carrier while so traveling, 1003.
- Does not come within fellow-servant rule, 1003, note 30.
- But assumes necessary risks and inconveniences characteristic of vehicle on which he is traveling, 1003.
- Where trainman in authority induces stockman to look after stock at a certain time, train should not be moved without notice to stockman, 1003, note 32.
- Where stockman given directions to reach connecting train, path should not be made dangerous by operation of trains and engines, 1003, note 32.
- When person riding on "employe's pass" is regarded as a passenger, 1004.
- Not necessary to be upon vehicle to constitute one a passenger, 1005.
- Person who gives proper signal at flag station, in attempting to board train when it has stopped, is a passenger, 1005, note 35.
- Person giving proper signal for omnibus to stop in attempting to board vehicle is a passenger, 1005.
- But circumstances must show express or implied invitation of carrier, 1005.
- Merely going on board to inspect vessel, or to select or reserve berth, does not create passengership relation, 1005, note 37.
- General rule as to question when person waiting to take train is entitled to protection as passenger, 1006.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—Who are passengers—con.

Person holding round trip ticket who comes to station with return coupon for purpose of making return journey is a passenger, 1006, note 38.

But to go to station three hours before train time is unreasonable, 1006, note 38.

Person who has purchased a ticket, in going to train under directions of station agent, is a passenger, 1006.

Person who wilfully waits until train has started and then runs after it is not a passenger, 1006.

Person who comes to station after last train has gone and waits there for his own convenience, is not a passenger, 1006.

Person merely on his way to station to take train not a passenger unless carried on carrier's vehicle, 1006.

Person who goes to station merely as spectator not entitled to protection as passenger, 1006.

Person may be passenger though received in vehicle before ready to start, 1007.

Prepayment of fare not always necessary, 1008.

When told by station agent to pay on train passengership relation exists, 1008, note 46.

When declaration by deceased person that he intended to take passage on defendant's train is admissible, 1008, note 46.

Injury while waiting but before purchase of ticket, 1009.

Is a passenger while coming to station on carrier's vehicle, 1010.

Person on platform waiting for train does not cease to be a passenger, 1011.

Injury to passenger on platform by objects thrown from passing train, 1011.

By piece of coal, 1011.

By stick of wood, 1011.

By mail bags thrown by mail agents, 1011.

By bundles thrown from express car, 1011, note 3.

Continues to be passenger though temporarily absent from vehicle, 1012.

Alighting from vehicle to send telegram, 1012, note 8.

Alighting from vehicle to obtain refreshments, 1012.

Alighting from train to transact passenger's own business, 1012, and notes.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*Who are passengers*—con.

Leaving train at intermediate point and going to hotel, 1012, note 9.

Distinction exists between passengers on through and local trains leaving vehicles, 1012.

Does not cease to be passenger by assisting carrier in emergency, 1013.

Injury to passenger while helping conductor to care for sick fellow-passenger, 1013.

Does not cease to be passenger by remaining on train after reaching his original destination with intention to continue his journey to another point, 1014.

What elements must exist to create the passengership relation, 1015.

Mere intention alone, without other circumstances, not sufficient to prove its existence, 1015.

How long the relation of carrier and passenger continues, 1016.

Must be given opportunity to alight from train safely, and to leave carrier's premises in customary manner, 1016.

Mere fact that passenger gets off on wrong side of car does not make him a trespasser, 1016, note 23.

Person taking railroad track to his residence no longer a passenger, 1016, note 23.

If passenger voluntarily re-enters train for means of crossing to other side of track, he is but a trespasser, 1016, note 23.

Question whether passenger has failed to leave carrier's premises within a reasonable time is one for the jury, 1016.

If person delays an unreasonable time in leaving depot, he is no longer a passenger, 1016, note 23.

Peddler proceeding to section house some distance from station no longer a passenger, 1016.

Failure to leave train immediately on account of being asleep does not terminate passengership relation, 1016.

When obligation to carry imposed, direct contract not necessary to create liability, 1017.

Liability of carrier for injuries to mail agents, 1017.

Liability of carrier for injuries to servants, 1017.

Carrier cannot delegate its duties to an association for an excursion, and is liable for negligence, 1017.

Where contract for carriage void because made on Sunday, carrier liable for negligence, 1017.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*Who are passengers—con.*

In absence of contract to contrary, carrier must exercise same care and diligence for safety of one not a passenger but lawfully on train as for safety of passenger, 1018.

Duty of carrier toward express messengers, 1018.

But contract that express messengers shall assume risk of all accidents or injuries in course of employment not against public policy, 1018.

Conflict of authority on question whether express messenger is chargeable with notice of terms of contract of express company and railroad company, 1018.

Duty of carrier toward porters on sleeping cars, news agents, fruit boys and lumbermen on log trains, 1018.

Carrier may waive prepayment of fare by passenger, 1019.

Passenger need only allege that he was ready to pay such a sum of money as carrier was legally entitled to charge, 1019.

Person accepted for carriage without payment or expectation of payment of fare as a passenger, 1020.

Children carried free are passengers, 1020.

But carrier must have knowledge that person or child is being carried free, 1020.

Infant cannot maintain action against carrier for injuries received before birth, 1020.

Same care and diligence due to gratuitous passengers as to others, 1021.

This rule based on the value which the law puts upon human life and safety, 1022.

Passengers under disabilities—

Where passenger misses train through negligence of agent, state of weather and condition of passenger may require that station be kept open until arrival of next train, 931, note 24.

Care due passenger by railway company where passenger left helpless on track through any cause, 914.

Carrier not required to accept sick, aged or disabled passengers, 992.

Such persons should provide themselves with the assistance needed, 992, note 27.

But if accepted, carrier bound to exercise a degree of care commensurate with the responsibility assumed, 992.

[REFERENCES ARE TO SECTIONS.]

PASSENGER—*Passengers under disabilities*—con.

Passenger who is taken sick on journey cannot be put off the vehicle and left unprotected, 992.

Reasonable care must be used in temporarily providing for his safety, 992.

Persons desiring immunities or amenities because of sickness should make their sickness known, 992, note 27.

Carrier bound to provide assistants of sick passengers a reasonable time to leave the train, 992, note 27.

Carrier liable for injuries to sick persons by carelessness of conductor in assisting them to alight from vehicle, 992, note 27.

Ejection of sick passenger from caboose between stations because of regulation of carrier against carrying passengers on freight trains, 992, note 28.

Treatment of sick passenger by gateman, 992, note 28.

Ejection of passenger stricken with paralysis, 992, note 30.

Death of sick passenger through exposure to the elements, 992, note 30.

Carrier should exercise greater vigilance toward blind and deaf passengers, 993.

But carrier must have notice of passenger's disability, 993.

If carrier has knowledge that passenger is intoxicated, the carrier should use special care to protect him from injury, 994.

If intoxicated passenger is left by brakeman in exposed place, carrier guilty of negligence, 994.

Carrier liable if intoxicated man ejected at dangerous place, 994.

But when carrier has done his full duty in ejection of drunken passenger, not liable if passenger wanders back on track and is killed, 994.

Carrier should warn children of danger and must not knowingly allow them to occupy positions of danger, 995.

Conduct scarcely blamable with grown person might be reckless in dealing with child, 995.

Not compelled to see that child female passenger does not leave her seat or disembark from train, 995, note 39.

Duty of carrier to furnish assistance to passengers who have fallen from train, 996.

Should either stop train, or remove him from track, or notify those in charge of train from which he is in danger, 996.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—

In general—

Distinction between carrier of passengers and common carrier of goods, 890.

Passenger carrier may at the same time be a common carrier of goods, 890.

Of goods, he must have absolute and unlimited control to be common carrier, 890.

But passenger must exercise at least ordinary prudence to escape danger, 890.

Passenger carrier not liable if passenger unnecessarily and voluntarily leaves a place of safety and stands in dangerous place, 890, note 1.

Passenger carrier not common carrier as to slaves, 891.

But liable for want of care in transportation, 891.

Carrier of passengers not insurer of their safety, 892.

Negligence essential to recovery against, 892.

Not liable for injury sustained at hands of lawless persons, except in case of negligence, 892.

When permission to ride gratuitously will not constitute one a carrier of passengers, 61, note 22.

Not common carrier of persons, 93.

But common carrier as to passenger's baggage, 93.

Damages for personal injuries to passenger are not within provisions of Harter Act, 347.

Degree of care and diligence required of carriers of passengers—

Not insurers against injuries to passenger through mere accident, 893.

Modern tendency is to hold some classes of passenger carriers to a higher degree of responsibility than was formerly required, 894.

Passenger carrier must exercise for the safety of his passengers *while upon his conveyance* utmost degree of care and diligence which human foresight will suggest in view of mode of conveyance employed, 895.

Usual statement is that carrier is bound to provide for safety of his passengers "as far as human care and foresight will go," 896.

Good faith and an honest purpose to avoid injury not the equivalent of highest degree of care, 896, note 11.

"Greatest degree of care and foresight" contemplates a higher degree of care than that imposed by law, 896, note 11.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Degree of care and diligence required of carriers of passengers—con.*

Passenger carrier not required to exercise all the care and diligence of which the human mind can conceive, 897.

Steel rails, or iron or granite cross-ties not required upon the roads of railway companies, because less liable to decay, 897.

Regard must be had to circumstances and means or manner of conveyance, 898.*

Due degree of care in driving stage-coach might be recklessness in running railroad train, 898.

Gross negligence at one stage of journey might not be so at another, 898.

Where circumstances require it, carrier owes passenger duty of warning him against danger, or acts of imprudence, 898.

Carriers by steam required to exercise even more exact skill, care and diligence than other carriers, 898.

Any negligence on their part, gross, 898.

In operation of freight or mixed trains, passenger carrier not held to degree of care which would destroy use of such trains for their primary purpose, 899.

Risks which passenger takes upon himself—

Carrier not liable for mere accidents or casualties which human prudence could not foresee, 900.

When carrier not liable for injuries due to stampede of other passengers, 900.

Effect of passenger knowingly accepting passage over a new road not yet open for traffic, 900, note 25.

Carrier not liable where passenger, without carrier's fault, walks off platform of standing car, 900, note 25.

Nor where carrier's servant accidentally falls against passenger, 900, note 25.

Nor where fellow passenger allows window to suddenly fall on passenger's hand, 900, note 25.

Nor where passenger, jumping on moving train, comes in contact with porter and is injured, 900, note 25.

Nor for injuries due to passengers all rushing to one side of boat, 901.

Carrier's responsibility for safety of means of conveyance—

Carrier of goods warrantor of absolute safety of vehicle, 902.

Carrier of passengers liable for injuries from palpable or easily discovered defects, 902.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Carrier's responsibility for safety of means of conveyance*—con.

Liable for injuries from defects discoverable by most careful and thorough examination, 903-905.

Not liable for latent defects which human care and skill cannot detect, 903-905.

Liability for defects attributable to fault of manufacturer—

Rule in New York and Tennessee, 906-908.

According to general rule, carrier liable for such defects, 909.

Same rule applies to bridges, 910.

Liability of carrier for defective culverts, 910, note 19.

Responsibility of carrier for equipping his vehicle with unsafe appliances—

Liability of carrier for defective seat in vehicle, 911.

For defective fastening on window, 911.

For defective doors, 911.

For misplaced coupling pins, 911.

For defective berths, 911.

For defective halyards, 911.

For defective ladders on freight cars, 911.

For engines out of repair, 911.

For upright iron flanges on car platform, 911.

For unguarded openings on deck of vessel, 911.

But railway company not bound to furnish glass doors, 911, note 22.

Carrier should equip engines with spark-arresters, 912.

When injury results from contributory negligence of another—

When carrier liable although the immediate cause of the injury is the negligent act of a third person, 913.

When passenger carrier liable for fault of consignee in unloading freight car, 913, note 32.

Or for injury to passenger from use of fire-arms by third person near track, 913, note 32.

Or for injury to passenger from trespasser loosening brake on car, 913.

Or for failure to have gang-plank properly secured, although immediate cause of injury was negligent operation of another boat, 913.

When carrier is liable although the immediate cause of injury is an act of God, 913.

Or although the immediate cause of injury is the negligent

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*When injury results from contributory negligence of another*—con.

collision of another boat with wharf boat over which passenger had to pass, 913, note 34.

Carrier liable if his own negligence concurs in any degree, 913.

Liability of carrier where injury is due to an intervening cause, 914.

Care due passenger by railway company where passenger is left helpless on track through any cause, 914.

Carrier liable when injury results from defects in roads of another company over which he runs his vehicle, 915.

Same rule applies where track runs over public bridge, 915.

Liability of carrier for safety of intermediate agencies employed, 916.

Liable for injury from leaving hatchway open in hulk used by him in embarking passengers, 916.

Where stage owner uses ferry, liable for negligence of ferry company, 916.

Ownership of vehicle immaterial, 916.

Carrier liable for negligent operation of sleeping-car employed by it but owned by another company, 916.

Liability for injury caused by concurrent act of two carriers, 917.

Liability of carrier for insufficient stational accommodations where station is used conjointly with another company, 917.

Liability for acts of lessee, 918.

Liability for acts of receiver, 918.

Liability for negligence of independent contractor, 919.

Liability for injury caused passenger by article brought into vehicle by another passenger, 920.

Liability for articles falling from parcel racks, 920.

Liability for baskets or valises placed in aisle, 920.

When carrier liable for injury caused passenger by dangerous articles brought into vehicle by another passenger, 921.

Duty of carrier to supply vehicle with necessary service and accommodations—

Duty includes supplying adequate corps of servants, 922.

With suitable retiring places, 922.

With seats if a day coach, 922.

With proper berths if a sleeping-car, 922.

With light and warmth, 922.

With drinking water, 922, note 12.

But retiring place not necessary on caboose, 922.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—con.*Duty in respect of management and running of vehicles—*

Carrier must exercise the highest degree of care and diligence, 923.

Liable if he so carelessly manages his trains that a collision ensues, 923.

Liable if statutory requirements as to making up train or stopping are not complied with, 923.

When leaving wounded animal near track is negligence, 923.

When operation of train with locomotive in the rear is negligence, 923, note 18.

When running of a freight train between passenger train and station is negligence, 923, note 18.

When failure to give proper signals is negligence, 923.

When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.

When failure to have a proper and fit telegraph line for running trains is negligence, 923, note 23.

Carrier liable for negligence of engineer in failing to discover animal on track, 923.

Carrier liable for negligent collision of ferryboat with dock, 923.

If violent storm drives freight train back on passenger track, servants of railroad company must exercise proper diligence in flagging passenger train, 923, note 24.

Carrier must keep track free from obstructions, 925.

Liable if freight platform constructed so near track that objects on it come in contact with arm of passenger resting on window-sill of passing car, 925.

Or if he permits mail bag to hang too near track, 925.

Or if freight car is placed so that its door, swinging open, might injure passenger on passing car, 925.

Or if workmen are permitted to pile stone too near the track, 925.

When railroad company liable for obstruction placed near its track by third person, 925.

Carrier must exercise high degree of care to avoid sudden jerks or jars, 924.

Negligence to make a running switch, 924.

Carrier liable for injuries resulting from jerks and jars resulting from use of too small an engine, 924.

But carrier not liable for injuries from jar caused by fellow-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty in respect of management and running of vehicles—con.*

passenger inadvertently setting emergency brake, 924, note 27.

Liability of railroad company where stone, attached to derrick, is swung into passing train, 925.

Liability of railroad company where it permits gravity road to be used in connection with its track, 925, note 32.

Duty of railroad company to keep a sharp lookout for cattle or other animals upon track, 925, note 32.

Running railroad train at high speed not of itself negligence, 926.

But attending circumstances may make it negligence, 926.

Consideration should be given to the character of the train, condition of road-bed, sharpness of curves, etc., 926.

When carrier liable for excessive speed although passenger was standing on platform of car, 926, note 26.

Nothing can justify running train at high speed over track known to be in a dangerous condition, 926, note 26.

Making up lost time, 926, note 26. .

Injury to passenger from sudden closing of door or window on carrier's vehicle, when negligence, 927.

In absence of custom, carrier need not provide entrance to its cars by express or baggage cars, 927.

Carrier under no duty to provide vestibuled trains, 927.

If vestibules are provided, carrier must see they are kept in repair, and are not needlessly left open, 927.

Duty of passenger carriers as to station facilities—

Duty of railway carriers in respect to platforms, approaches and station accommodations, 928.

Bound to make safe platforms and approaches thereto, and grounds reasonably near to such platforms, 928.

But railroad not bound to furnish safe premises at place where ticket is purchased, if purchased from a ticket broker, 928, note 9.

Disagreeable station accommodations may excuse act of imprudence in passenger in entering cars before drawn up to platform, 928.

Railroads may enforce regulations as to smoking in station, 928.

Character of accommodations required varies with amount of business done at particular points, 929.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities*—con.

At flag stations, railroads may be relieved altogether of obligation to furnish depots or platforms, 929.

Passenger cannot recover from railroad where he knowingly goes to flag station at night, and is made sick through exposure to the weather, 929, note 11.

If large crowds attracted through low rate excursions, railroads should provide accommodations commensurate with number of persons invited to be present, 929.

Railroad liable where large excursion crowd attracted, and by using only one of five possible gates at station, passenger is injured, 929, note 14.

Gist of action against railroad company is implied assurance that facilities are in good condition, 930.

Not liable for injuries to passenger where latter falls down unfinished step of unfinished and unused station, 930.

Nor are station facilities required where person takes passage upon a construction train to go over unfinished railroad, 930.

If necessary, fire should be provided in waiting room, 931.

Failure to provide such accommodations *prima facie* evidence of negligence, 931.

In Texas, duty imposed by statute, 931.

Defective chairs or benches must be removed from waiting room, 931.

Question as to whether retiring places must be provided is not definitely determined in America, 931.

In Kentucky, required by statute, 931.

In England, held not to be necessary adjuncts and charge may be made when provided, 931.

In America, custom is to the contrary in cities and towns, 931.

Probably not required in small villages and hamlets, 931.

If retiring place provided, railway company liable for negligence in maintaining or repairing it, 931.

Length of time that waiting rooms and retiring places must be kept open is usually regulated by statute, 931.

In absence of statute, must be kept open a reasonable time before arrival or departure of trains, 931.

What is a reasonable time is a question of fact, 931.

Thirty minutes before departure of train may be reasonable, 931, note 24.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities—con.*

But where passenger misses train through negligence of agent, state of weather and condition of passenger may require that station be kept open until arrival of next train, 931, note 24.

Baggage rooms are not private rooms, as against owners of baggage who are permitted to enter, 932.

Invitation of baggage master to enter baggage room is invitation of company, 932.

In such case room must be made safe for passenger, 932.

If one enters baggage room against express regulation of company, and without permission of baggage master, only entitled to care due trespasser, 932.

Whether permission has been given to enter baggage room is a question for the jury, 932.

Railroad must construct platforms which will form safe and convenient means of exit to and from cars for all passengers, 933.

Law does not determine of what material platform must be constructed, 933, note 26.

As a general rule, no imputation of negligence where platform for years has proved adequate, safe and convenient, 933, note 26.

When evidence as to unsound condition of platform at points other than where accident occurred is competent, 933, note 26.

Negligence to construct platform so far below lowest car steps that passengers must make dangerous leaps, 933.

Female passenger not compelled to turn around and let herself down backwards, 933, note 27.

Constructing platform 26 inches below level of lowest car step is negligence, 933, note 27.

But 18 inches not negligence *per se*, 933, note 27.

Whether platform was sufficiently elevated is a question of fact relating to "foresight" and not "hindsight," 933, note 27.

May be negligence to require passenger to alight on small box on ground, 933, note 27.

Negligence to have such a space between station and car platform that passengers may fall between them and be injured, 933.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities—con.*

Constructing platform between tracks so narrow that passengers must stand dangerously near train is negligence, 933.

But not required that platform be so constructed that nearest edge is safe as standing place while trains are passing, 933.

When evidence may be introduced that witness had met with accident at same place, before happening of accident to plaintiff, 933, note 28.

Question of negligence in construction of platform is usually one for the jury, 933.

Negligence to maintain platform with dangerous slope toward lower track platform, 933.

Existence of hole in platform, after knowledge of its condition, is gross negligence, 933.

When evidence of holes allowed by carrier to exist in platform some time before passenger's injury is inadmissible, 933, note 33.

When it is negligence to leave uncovered water box set in ground where train usually stops, 933, note 33.

Railroad company not liable for mere accidents to passenger on safe platform, 933.

Nor where passenger, when injured, was using platform for purpose for which it was not adapted, 933.

Railroad company not bound to provide platform away from station for persons attempting to board train while in motion, 933.

Nor for persons who accidentally fall from train, 933.

Passengers must use platforms intended for them, 934.

When injured on platform, or part of platform, used exclusively for freight, railroad company not liable, 934.

Railroad bound to keep platform of station free from obstructions, 935.

Every indulgence of carrier in permitting objects to remain on station platform not necessarily negligence, 935.

If depot platform used for freight, carrier must exercise degree of care commensurate with the added danger, 935.

Leaving empty milk cans on platform, 935, note 1.

Ordinarily question whether due care has been used is one for jury, 935.

Negligence for railroad company to permit platforms to re-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities—con.*

- main covered with snow and ice so as to be unsafe for alighting passengers, 935.
- Snow or ice should be removed, or salt or ashes scattered over them, 935.
- May be negligence to permit mail bag to remain on platform, 935.
- Railroad liable for negligently leaving hose, trucks or skids in dangerous position, 935.
- Accumulations of oil or grease on station platform may be negligence, 935.
- Liability of railroad company where obstruction on platform is due to third persons, 935.
- Liability for banana skins on platform, 935.
- Liability for careless handling of truck by baggage master, 935, note 6.
- Railroad company not liable for accidental tripping of passenger over foot of baggage master, 935.
- Platform and station must be well lighted, 936.
- Lights should be maintained for reasonable time before and after departure of trains, 936.
- Character of lights required depends on character of station, 936.
- Fact that train is special train no excuse for not having platform properly lighted, 936.
- Carrier liable if through failure to provide proper lights passenger falls over hampers, switch handles or other obstructions and is injured, 936.
- Railroad company not bound to light station for express company's agent who comes to baggage room several hours before express train is due, 936, note 12.
- Whether evidence as to lighting of station before or after the action is admissible, 936, note 12.
- Effect of delay of train on lighting of platform, 936, note 18.
- Person coming to station after last train is gone cannot recover for injuries sustained by extinguishment of lights, 936.
- Company not liable where person recklessly walks off in darkness caused by temporary removal of lights, 936.
- Nor where person injured when all the light is furnished that experience has shown to be necessary, 936.
- Failure to light station not proximate cause of assault on

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities—con.*

female passenger by third person while passenger seated there alone, 936.

Carriers by railroad must provide reasonably safe means of getting to and from stations or trains, 937.

Carrier liable if it erects bridge giving access to its station and bridge falls, 937.

Or if it fails to plank bridge, place proper guard rails around it, or keep it in repair, 937.

Railroad liable where passenger is injured by being pushed from narrow passage way of boards to train, 937.

Railroad company only bound to provide one safe exit from trains, 937.

In absence of knowledge that only one route is provided, passenger may use other route which appears safe and designed for foot passengers, 937.

Whether passenger was justified in selecting particular route, or whether route was safe, are questions for the jury, 937.

If passengers adopt customary route with acquiescence of carrier, latter must take reasonable precautions to render such route safe, 937.

Immaterial in such case whether carrier furnished route, 937.

If passenger injured by accumulation of ice on customary route for egress from station, carrier liable, 937, note 29.

When carrier provides safe and commodious exit from train, passenger must use it, 937.

In such case carrier not liable if passenger leaves train and proceeds along track, 937, note 30.

Or goes off in darkness somewhere else, 937.

Or climbs over locked gate and goes in another direction, 937.

Or disregards safe route and goes by path where trucks are being unloaded from baggage car, 937, note 30.

Responsibility of railroad for accumulations of snow and ice on stairways of station, 937, note 33.

Sidewalk adjoining station must be kept in reasonably safe condition, 937.

If car does not reach platform, and passenger is invited to alight, reasonably safe way must be provided to platform, 937.

Negligence for freight train to block crossing or passage way

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities—con.*

to depot when passenger train is taking on or discharging passengers, 937.

Railroad cannot escape liability for failure to exercise ordinary care by showing delegation of duty to third person, or ownership of station facilities in another, 938.

Railroad company liable for defect in stile used by passengers with its acquiescence, 938.

Not relieved from liability by use of union depot, controlled by separate corporation, unless use made obligatory by statute, 938.

Liability of intersecting railroads for maintenance and lighting of common depots or platforms, 938.

Passenger not justified in incurring danger to avoid inconvenience, 939.

Carrier not liable for not guarding against accidents not reasonably to be anticipated, 940.

Carrier not liable for injury due to slipping on brass nosing of step leading to platform which had been worn smooth by constant use, 940.

Carrier need not provide hand railings to station stairway when it is protected by walls on both sides, 940.

Carrier not liable for injury due to stumbling over weighing machine, used for a long time without an accident, 940.

Nor where horse broke away and came upon platform and injured passenger, 940.

Nor for explosion of heating apparatus in hotel where ticket office was maintained, 940.

Degree of care in respect of station arrangements not so great as in respect of tracks and running machinery, 941.

In respect of station arrangements, carrier bound only to ordinary care in view of dangers to be apprehended, 941.

Exceptional rule in Nebraska by statute, 941, note 50.

Duty of carriers by water in respect to wharves, approaches and station facilities, 942.

Must provide reasonably safe and suitable docks, 942.

Duty also extends to safely mooring vessel to dock, 942.

But passenger must exercise at least ordinary care for his own safety, 942.

Carrier liable if insufficient light provided, 942.

Or if passenger injured by stepping into hole on wharf, 942.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of passenger carriers as to station facilities*—con.

Carrier must provide suitable gang plank, 942.

When guard rails necessary for gang plank, 942.

Roadways and bridges leading to wharf or boat must be maintained in reasonably safe condition, 942.

Liability of ferry company to passengers for station facilities and mooring boat, 942, notes 6, 9 and 13.

Passenger chargeable with contributory negligence if he does not avail himself of arrangements for a safe boarding or landing, 942.

Carrier liable for injuries to passenger from careless handling of vessel's appliances, 942.

Powers of such corporations to adopt regulations as to admission into depots and stations—

Have right to adopt reasonable regulations to exclude third persons from grounds and buildings as their business and convenience of passengers may require, 943.

Such regulations must be general and impartial, 943.

Presumption exists that their reasonable rules and regulations are for the public advantage, 943.

Railroad may regulate frequenting of depots by hotel-keepers or their servants, 943.

May exclude persons who come to sell lunch to passengers, 943.

Railway companies may adopt reasonable regulations regulating conduct of passengers themselves while in depot or on station grounds, 943.

May prohibit passengers from sleeping in waiting rooms, or lying on benches, 943.

May require white and colored passengers to occupy different rooms if accommodations are equal, 943.

Railway company cannot prohibit entrance of passenger's own carriage to station grounds to carry him or his goods to or from the train, 944.

Nor entrance of carriage of hackman, which by contract made elsewhere with passenger, has become carriage of passenger *pro hac vice*, 944.

Right of railroad company to grant exclusive right to certain favored hackmen to solicit patronage in its station or grounds in dispute, 944.

Right to grant such exclusive privilege upheld by courts of England, by the Supreme Court of the United States, and

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Powers of such corporations to adopt regulations as to admission into depots and stations*—con.

by the Supreme Courts of Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island and Virginia, 944.

Hackmen and cabmen may, however, use a public sidewalk in prosecuting their calling, if such use is not materially obstructive, 944.

Right to grant exclusive privilege to favored hackmen denied in Indiana, Kentucky, Michigan, Missouri, Mississippi, Montana, and possibly by the Supreme Court of Illinois, 945.

This view based on theory that passenger should not be exploited by creation of monopoly, 945.

But under latter view railroad company may make reasonable regulations as to where hacks or cabs shall stand, 945.

Courts divided on question whether railway company can grant exclusive access to its terminal wharf to favored steamboat line, 946.

Duty to keep roads, vehicles, etc., in repair—

Must use same care in keeping road in order as in selecting vehicle, 947.

Especially is this so in regard to railroads, 947.

Highest degree of care required in construction of road-beds, 947.

But need not be so expensive as to make business of carrier impracticable, 947.

Not liable for defect in road-bed caused by extraordinary and unforeseen event, when due diligence used, 947.

Not required to provide against unprecedented storms and floods, which cannot reasonably be foreseen, 948.

Not liable for breaking of rail by sudden action of frost and great variation in temperature, 948, note 49.

Not liable for accidents due to snow slides in regions where they had never occurred before, 948, note 49.

Nor for giving way of an embankment due to an unprecedented rain, 948, note 49.

But railroad company is liable for accidents due to excavations in right of way, 948, note 49.

Or for damage from floods in locality noted for heavy rains and floods, 948, note 49.

When unsound materials used in subsidiary appointments, carrier liable, 949.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty to keep roads, vehicles, etc., in repair*—con.

Liable for unsound rails, defective switches, etc., 949.

Liable for rotten ties, 949, note 52.

Not enough that track is in "apparently" good condition, 949, note 52.

When evidence is admissible of condition of track in the immediate vicinity, 949, note 52.

Not liable for accident caused solely by negligence or trespass of stranger, 950.

Carrier will be liable for act of stranger when done at request of carrier's servant or with his acquiescence, 950.

Accident from latent defect, when carrier liable for, 951.

Liability for not discovering in time openly existing defect in track, 951.

Liability for breaking of car wheel, 951, note 3.

Liability for broken rail, 951.

Responsibility for not adopting useful improvements to promote safety of passengers—

Liable for failure to adopt known and generally used improvements conducive to safety of passengers, 952.

Not bound to use every possible means to avoid injury which highest degree of skill and ingenuity might suggest, 952.

Nor for failing to adopt untried machine or mode of construction, 952.

Use of open and closed steps on stage coaches, 952, note 5.

Use of chain between railings on rear platform of passenger car in mixed train, 952, note 5.

Use of switches of improved patterns, 952.

If old cars used, they must be kept in good repair, 952, note 6.

Freight trains need not have all safety appliances used on passenger trains, 952, note 6.

Headlights need not be "of the most approved pattern in use," 952, note 6.

All ferry-men need not necessarily use the same safety appliances, 953.

Liability of vessel for latent defects, 953, note 8.

Use of brass covering on stairs of steamboat, 953, note 8.

Duty of railroad company to maintain "whip lashes" near overhanging structures or bridges, 954.

Injury to stockmen passing over freight car by snow shed, 954.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Responsibility for not adopting useful improvements to promote safety of passengers—con.*

Duty of railroad company to maintain fences along right of way to keep animals off track, 955.

Duty imposed by statute in some states, 955.

Duty as to examination of vehicle and other apparatus—

Examination should be made of vehicle immediately previous to each journey, 956.

Rule even more stringent as to steamboats and railways, 957.

Cursory inspection of conductor or brakeman need not be as exhaustive as a regular inspection while the train is at rest, 957.

Such inspection cannot be continuous, 957.

Railroad company not therefore liable for accidental locking of door of water-closet on female passenger, 957.

Or until it has had an opportunity to remove it for accumulation of snow or ice, vomit or mud on steps or platform of car while en route, 957.

Vessel not liable for failure to keep floor constantly dry around water cooler in steerage of vessel; 957, note 14.

Nor for injuries to passenger due to falling over socket for table in dining saloon, when passenger is cognizant of its presence, 957, note 14.

Liability for ice on deck of ferry-boat, 957, note 14.

No legal duty on railroad company to remove ice from railing or platform of express car, 957, note 18.

Railroad company not liable for persistence of passenger in getting off at end of car where there is snow and ice, when conductor is assisting passengers in alighting at other end, 957, note 18.

Inspection required while cars are at rest is much stricter than when in motion, 957.

This vigilance extends to sleeping cars owned by another company, but used by its passengers, 957.

Liability for snow and ice on car steps before car starts, 957, note 21.

Responsibility for character of servants employed—

Servants must be competent, attentive and skilful, 958.

Driver of coach on dangerous route must be cool, self-possessed and prudent, 958.

Carrier liable for negligence or incompetency of, 959.

Driver of coach must select least dangerous route, 959.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Responsibility for character of servants employed—con.*

Must caution passengers in passing over dangerous part of route, 959.

Liable for accident from racing or improper speed, 959.

When passenger has been put in dangerous position by negligence of driver and injures himself in attempting to escape, carrier liable, 959.

Or where accident occurs through intoxication of driver, 959.

Liability of railroad for injury to passenger due to brakeman wantonly calling, "Jump for your lives," 959, note 30.

Corporations organized for carrying, responsible for negligence or incompetency of servants, 960.

Constructively present when servant acting within scope of authority, 960.

Carrier by steam held to strictest accountability for competency and skill of servants, 960.

But shipowner not liable for failure of master to deliver telegram gratuitously to passenger, 960, note 32.

Carrier liable when employe, acting in line of his duty, pushes or crowds a passenger about to alight, and an injury ensues, 960, note 33.

Gross misconduct knowingly to employ incompetent or intemperate servant, 961.

In such case, liable for vindictive damages to passenger injured thereby, 961.

Presumption that accident was caused by his intemperance in such case, where injury occurs which might have been avoided by skill, 961.

Intemperate habits of railway employe with knowledge of company may be shown in aggravation of damages, 961.

Retention of, ratifies act, 961.

Duty to accept as passengers those who offer themselves for carriage—

In England, railway and canal companies bound by statute to carry all who offer, 962.

There may be public carriers of passengers as well as private carriers of persons for hire, 963, note 43.

In America, public passenger carriers bound to carry all who offer against whom there is no legal objection, 963.

Having secured right to enter, passenger may make reason-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty to accept as passengers those who offer themselves for carriage*—con.

able effort to enter car, and carrier liable for any tort against his person in refusing admittance, 963.

Passenger entitled to recover where prevented by gate-keeper from reaching train, 963, note 44.

Railroad companies may lawfully refuse to carry passengers on freight trains, 964.

Where railroad company has so divided traffic, presumption is that person riding on freight train is not a passenger, 964.

But this presumption may be overcome by showing long continued and notorious disregard of such a regulation, 964.

Railroad company may exclude passengers from "pay train," 964, note 1.

No presumption that freight train carries passengers from fact that it has caboose attached, 964, note 2.

Person relying on long continued and notorious disregard of company's regulation not to carry passengers must not have known of the company's regulation, 964, note 3.

In absence of rule or established custom, presumption is that those in charge of freight trains have no authority to accept passengers, 964.

Presumption may be overcome by order of superior officer of conductor, 964, note 4.

Some courts, however, hold that person applying may rely on authority of conductor, 964.

But he has no right to rely on authority of a brakeman, 964.

So he cannot claim rights of passenger where he colludes with conductor, 964.

And conductor certainly cannot authorize him to ride upon engine, 964.

Where railroad company receives and undertakes to carry passengers on freight train, it cannot secretly limit conductor's authority, 964.

And person entering train at direction of station agent is not a trespasser, 964.

If ejected while train is in motion, or at dangerous or improper place, carrier liable, 964.

Passenger must comply with railroad's reasonable requirements for riding on freight trains, 964.

And must accept the necessary incidents and inconveniences thereof, 964.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty to accept as passengers those who offer themselves for carriage*—con.

Railroad company under no duty to accept passengers on special or emergency trains, 965.

Whom carrier may refuse to accept—

Persons refusing compliance with reasonable regulations, 966.

Or who are of bad character, 966.

Or who are afflicted by contagious disease, 966.

Or gamblers or monte men, 966, note 16.

Or person who refuses to pay fare, 966.

Or persons whose object is to interfere with business of carrier, 966.

Or one who is likely to become a burden on his fellow-passengers, 966.

Or persons likely to excite popular violence, or to be exposed to peculiar danger at destination, 966.

Or person warned to stay away from destination by vigilance committee, 966, note 17.

If, notwithstanding physical disability, carrier can easily infer that person is able to travel alone, he cannot refuse to accept him as a passenger, 966.

So if proper assistance is provided disabled person, carrier cannot refuse him carriage, 966.

In absence of usage to contrary, carrier may refuse to admit person in car carrying packages of merchandise, 966, note 17.

Blindness unfits person for safe travel, if unaccompanied, 967.

But agent should listen to explanation as to competency of blind person to travel alone, 967.

Carrier may insist that insane persons be properly attended, safely guarded, and securely restrained, 968.

In violent cases, carrier may require seasonable notice in order to make proper arrangements, 968.

Carrier may refuse admittance to person so intoxicated as to be dangerous or annoying, 969.

If accepted, however, intoxicated person cannot be ejected so long as he demeans himself peacefully and properly, 969.

Rule of carrier excluding intoxicated persons not admissible against person afflicted with St. Vitus dance, 969, note 21.

Carrier not bound to accept persons whose object is to interfere with interests or business of carrier, 970.

Carrier may grant exclusive right to solicit on vehicles, 970.

But cannot deny admission to vehicle to person merely be-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Whom carrier may refuse to accept—con.*

cause he does something detrimental to carrier's business at other times and places, 970.

Cannot deny admission to person merely because he is a "ticket scalper" elsewhere, 970, note 25.

Conductor of train not required to inquire into cause of arrest and authority of officer when latter takes prisoner with him on train, 971.

Passengers may be separated according to sex, character, etc.—

Passengers may be separated into different classes according to the fare which may be charged, 972.

May interdict intrusions by one class on accommodations prepared for others, 972.

Separations on account of color, 972.

Constitutionality of state statutes requiring separate accommodations for white and colored passengers, 972, note 28.

May enforce separation of male and female passengers, 972.

Effect of male passenger entering ladies' car without objection, 972, note 29.

Contracts for carriage understood as made with reference to such regulations as to separation, 973.

Ejection of passengers for misconduct—

When once accepted, a passenger cannot be ejected unless guilty of some misconduct, 974.

Not to be ejected for supposed bad character if properly conducting himself, 975.

Person cannot be ejected on ground he is a pickpocket without any act of misbehavior on his part, 975.

Or woman, conducting herself properly, cannot be ejected because of general bad character, 975.

When one passenger may be ejected for misconduct of another, 976.

Ejection of keeper with madman, or officer with prisoner, 976.

Ejection of father with adult son, 976.

Passenger may be ejected for misconduct interfering with comfort of other passengers, 977.

Or for interfering with business of carrier, 977.

In expelling passenger, carrier's servants act at their peril, 977.

If wrongfully ejected, misapprehension will afford carrier no excuse, 977.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Ejection of passengers for misconduct*
—con.

Right to eject drunken passenger is subject to limitations, 978.

Care must be taken to expose person ejected to no unusual or unnecessary hazards, 978.

Conductor must use reasonable care and caution, 978.

May eject drunken passenger if it is reasonably certain he will become offensive or annoying to other passengers, 978.

Or if drunken passenger advises other passengers to refuse to pay fare, 978, note 36.

Or if he is guilty of using obscene and vulgar language, 978, note 36.

But mere breach of table manners in being drunk does not authorize carrier to eject passenger, 978.

So mere breach of table manners in eating does not authorize carrier to eject passenger, 979.

Duty of the carrier to protect the passenger—

Passenger, on entering vehicle, has right to claim the protection of the carrier from insults and violence of others, 980.

Law exacts from carrier prompt employment of all means at his command to protect passenger either by quelling disturbance or by expulsion of those engaged in it, 980.

Carrier liable for injury to other passengers if he fails to restrain one having *delirium tremens*, 980, note 40.

Negligence for which carrier is liable is not the wrong of the fellow-passenger or stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed, 980.

Conductor merely telling persons abusing passenger to "stop that fooling" is not sufficient, 980, note 41.

Carrier liable when conductor on breaking out of trouble seeks rear part of car to "stop the train," 980, note 41.

Evidence of diligence of conductor in suppressing disorder must be diligence in suppressing disorder which arose after plaintiff became a passenger, 980, note 41.

Railway company may be liable for death of passenger caused by insane fellow-passenger, 980, note 41.

Knowledge of carrier's servants that wrong was imminent is essential in order to hold carrier liable for omission to prevent it, 980.

If passenger assaulted while conductor is attending to his

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of the carrier to protect the passenger*—con.

- duties in another part of the train and does not know of threatened assault, carrier is not liable, 980, note 42.
- Liability of carrier for death of passenger on sleeping-car from shot of robber, 980, note 42.
- Carrier not liable if passenger is assaulted while crew of train are gone to meal station to eat, 980, note 42.
- Carrier bound to protect against assaults which might reasonably be expected under circumstances of case and condition of parties, 981.
- Liability of carrier for assault on colored passenger by white passengers, 981, note 1.
- Liability of carrier where conductor with fellow-passengers so intimidate passenger that he leaps from train and is injured, 981, note 1.
- For conductor to keep his train in motion and busy himself in collecting fares while fight is going on falls short of his duty, 981.
- Carrier must protect female passengers against general obscenity, immodest conduct or wanton approach, 982.
- But carrier not liable for assaults on female passengers made under circumstances which carrier could not possibly have foreseen, 982.
- Carrier not liable for accidents arising from rudeness or incivility of fellow-passengers, 983.
- Not liable where passenger's arm jammed through window of car door by pell-mell rush of other passengers, 983, note 5.
- Or where female passenger is injured by male passenger pushing past her with a valise, 983, note 5.
- Or where female passenger's leg is broken through being jostled by male passenger, 983, note 5.
- Or where female passenger is injured by male passenger rudely pushing door open and striking her in face, 983, note 5.
- Duty of carrier to restrain or eject drunken passengers, 984.
- Liability of carrier where drunken passenger had assaulted another passenger than plaintiff before injury to plaintiff occurred, 984, note 6.
- Use of profane language before lady by drunken passenger after conductor failed to interfere on complaint, 984, note 6.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of the carrier to protect the passenger*—con.

- Abuse of negro passenger by drunken men, 984, note 6.
- Shooting of boy by drunken passengers who had previously been shooting off dynamite sticks, 984, note 6.
- Drunken passengers compelling negro to dance at point of revolver, 984, note 6.
- Evidence of improper relations between passenger and wife of assailant not admissible on question of failure to properly protect passenger, 984, note 6.
- Carrier bound to exercise utmost vigilance in guarding against careless use of firearms, 985.
- Liability of carrier for accidental discharge of musket by disorderly soldier, 985.
- Liability of carrier where conductor retreats from scene of difficulty and passenger is shot by one of a disorderly crowd of men on train, 985.
- But duty of carrier is fulfilled when he has exercised the force at his command to prevent injury, 985.
- Carrier's duty to protect passengers from injuries by strikers, 986.
- Ordinarily not guilty of negligence in operating cars during strike of employes, 986.
- But carrier cannot invite trouble by receiving mob of hostile strikers in car who are inflamed against person already a passenger, 986.
- Ordinarily carrier cannot interfere to protect passenger from arrest, 987.
- Carrier's duty extends to protecting passengers against acts of violence by passengers who have been ejected or have alighted, 988.
- Duty of carrier to protect passengers while in station or depot, 989.
- In order to make carrier liable, latter's agent in charge of station must have known, or had opportunity to know, that injury was threatened which he could prevent or mitigate, 989.
- Carrier liable if agent stands by without any attempt to prevent the wrongful act against the passenger or an intending passenger, 989.
- Carrier liable if he fails to guard against long continued

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of the carrier to protect the passenger*—con.

and notorious acts of third persons, such as scuffling by cabmen, etc., 989.

Notice to employe whose only duties are to clean up waiting room and keep up fires is insufficient, 989, note 17.

If passenger charges men with robbery, it is no breach of duty on part of carrier to start the train at the appointed time without waiting for them to be given in custody, 989, note 17.

Carrier held liable where plaintiff pelted with eggs, station agent not interfering, 989, note 18.

Carrier liable where no warning was given that persons were fighting with pistols near car steps and passenger was shot while alighting, 989, note 18.

Carrier held liable for station agent's failure to stop use of insulting language to lady in his presence, 989, note 18.

Liable for failure of station agent to restrain drunken man who flourished knife and sang vulgar songs in his presence, 989, note 18.

Difference between passenger and stranger in degree of care and diligence to be used—

Bound to highest degree of human skill and foresight in preventing injuries to passengers, 990.

As to strangers or trespassers, only required not to be an aggressor wantonly and to use every reasonable precaution to avoid their injury, 990.

No duty owed to trespasser unless his position of danger is known to operatives of train, and then only to use reasonable care, 990, note 20.

Authority of a railroad conductor to eject trespassers, 990, note 20.

Sharp division of opinion on question whether a brakeman has implied authority to eject trespassers, 990, note 20.

Person coming to station to assist passengers, though not a passenger, is not a trespasser, 991.

Carrier owes him at least ordinary care to see he is not injured by defective station facilities or approaches thereto; 991.

So if carried off by moving train conductor cannot force him off while train moving at dangerous speed or lock the door

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Difference between passenger and stranger in degree of care and diligence to be used—con.*

in his face and leave him in dangerous position on platform, 991, note 22.

Carrier should hold train a reasonable time for him to render needed assistance and leave the train, 991.

Carrier liable if person rendering assistance is injured by sudden starting of train or omission to give customary signals, 991.

Liability of carrier to persons coming to assist passengers for injuries due to truck being struck by passing car, 991, note 23.

For injuries due to mail bag thrown from car, 991, note 23.

For injuries due to unsafe condition of station approach, 991, note 23.

For injuries due to brakeman on passing car swinging his body out and striking plaintiff, 991, note 23.

For injuries due to improper lighting of platform, 991, note 23.

For injuries due to assaults by third persons 991, note 23.

Where no necessity to go upon the train, carrier only owes him duty of ordinary care, 991, note 24.

Carrier not liable if person accompanying passenger goes from car to car, and conductor fails to hold train until he alights, 991, note 24.

Carrier not liable if person accompanying passenger attempts to leave the train while in motion and is injured, 991, note 24.

Carrier should be notified of such person's presence on the train, 991.

What sufficient to put carrier on notice of such person's presence and intentions on train, 991, note 25.

Duty of carrier toward passengers under disabilities—

Carrier not required to accept sick, aged or disabled passengers, 992.

Such persons should provide themselves with the assistance needed, 992, note 27.

But if accepted, carrier bound to exercise a degree of care commensurate with the responsibility assumed, 992.

Passenger who is taken sick on journey cannot be put off the vehicle and left unprotected, 992.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Duty of carrier toward passengers under disabilities*—con.

Reasonable care must be used in temporarily providing for his safety, 992.

Persons desiring immunities or amenities because of sickness should make their sickness known, 992, note 27.

Carrier bound to provide assistants of sick passengers a reasonable time to leave the train, 992, note 27.

Carrier liable for injuries to sick persons by carelessness of conductor in assisting them to alight from vehicle, 992, note 27.

Ejection of sick passenger from caboose between stations because of regulation of carrier against carrying passengers on freight trains, 992, note 28.

Treatment of sick passenger by gateman, 992, note 28.

Ejection of passenger stricken with paralysis, 992, note 30.

Death of sick passenger through exposure to the elements, 992, note 30.

Carrier should exercise greater vigilance toward blind and deaf passengers, 993.

But carrier must have notice of passenger's disability, 993.

If carrier has knowledge that passenger is intoxicated, the carrier should use special care to protect him from injury, 994.

If intoxicated passenger is left by brakeman in exposed place, carrier guilty of negligence, 994.

Carrier liable if intoxicated man ejected at dangerous place, 994.

But when carrier has done his full duty in ejection of drunken passenger, not liable if passenger wanders back on track and is killed, 994.

Carrier should warn children of danger and must not knowingly allow them to occupy positions of danger, 995.

Conduct scarcely blamable with grown person might be reckless in dealing with child, 995.

Not compelled to see that child female passenger does not leave her seat or disembark from train, 995, note 39.

Duty of carrier to furnish assistance to passengers who have fallen from train, 996.

Should either stop train, or remove him from track, or notify those in charge of train from which he is in danger, 996.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—con.

Who are passengers—

Impossible to frame definition of "passenger" embracing all essential elements, 997.

Every person, not an employe, being carried with express or implied consent of carrier upon a public conveyance is presumed to be lawfully upon it as a passenger, 997.

Presumption does not extend to private vehicles, such as to a brewer's wagon, 997, note 44.

Persons borrowing engine and car for their own use are not passengers, 997, note 44.

Undertaking on part of person to travel in conveyances provided by carrier essential to constitute a passenger, 997.

Acceptance by the carrier of the person as a passenger also essential, 997.

Acceptance by carrier may be implied from surrounding circumstances, 997.

If train be fitted for carriage of passengers, and placed in position where persons are induced to enter as passengers, carrier must show they had notice it was not intended for their use, 997.

On vehicles palpably designed for carriage of passengers, presumption exists of authority of carrier's employes to create relation of passengers, 998.

This presumption not conclusive, 998.

Presumption exists even in favor of employe of railroad company riding in passenger coach at invitation of yardmaster, 998.

One accepted by conductor on special excursion train is passenger, 998, note 47.

Engineer ordinarily has no right by his invitation to create passengership relations, 998, note 47.

Persons intending to become passengers presumed to know they must enter coaches set apart for passengers, 999.

Trespassers if, without inquiry, they go upon baggage, mail or express cars, 999.

No presumption that person riding on vehicle not intended for passengers is passenger, 1000.

Riding on freight train, 1000.

Riding on locomotive of train, 1000.

Riding upon engine cab, 1000.

Or upon hand-car, 1000.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Who are passengers—con.*

Or upon stone, work or construction train, 1000.

Or upon baggage wagon of omnibus or transfer company, 1000.

Person upon conveyance by fraud, or against express orders of carrier, not a passenger, 1001.

Person fraudulently evading payment of fare not a passenger, 1001.

Person claiming to be "passenger must be lawfully on train, 1001.

Riding on pass as a "visitor," 1001, note 11.

When testimony of railroad company's auditor is competent as to whether person was a passenger and his ticket had been taken up by certain conductor, 1001, note 11.

Attempt at evasion of fare will not deprive person of right to enter passenger car and pay fare, 1001, note 11.

Person traveling fraudulently on free ticket of another can recover only for gross negligence, 1001.

Passengership relation not entered into by child entering car to play, 1001.

By person who steals ride on engine, 1001.

By person riding in mail car without right or knowledge of carrier's servants, 1001.

By person riding clandestinely on steps of car, 1001.

By person climbing into caboose without ticket or fare, 1001.

By person attempting to "dead head" or "beat" his way, 1001.

By person riding on freight train with knowledge of express rules of carrier to the contrary, 1001.

By person entering into collusive arrangement with the conductor, brakeman or other employe, even though sum of money paid, 1001.

Passenger by mistake on wrong train is not a trespasser, 1002.

Should be carried to place reasonably safe and convenient to get upon proper train, 1002.

Person getting on train in good faith with supposedly proper ticket is not a trespasser, 1002.

But duty of railroad company ceases when person on wrong train voluntarily leaves train at place other than a station, and proceeds along railroad track, 1002, note 26.

Person riding on "drover's pass," entitled to protection as passenger, 1003.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Who are passengers—con.*

- Attempt to limit authority of carrier's agent by requiring him to impose limitation of liability void, 1003, note 29.
- Effect of limitation of carrier's liability to his own line in contract, but not in "drover's pass," 1003, note 29.
- Person traveling on "drover's pass" not charged with knowledge of limitation of carrier's liability contained in contract between shipper and carrier, 1003, note 29.
- Carrier by water liable to one carried on boat for purpose of caring for live stock for negligence in lighting boat, 1003, note 29.
- Status of person traveling on "drover's pass" not changed by recital in contract that he is an employe of carrier while so traveling, 1003.
- Does not come within fellow-servant rule, 1003, note 30.
- But assumes necessary risks and inconveniences characteristic of vehicle on which he is traveling, 1003.
- Where trainman in authority induces stockman to look after stock at a certain time, train should not be moved without notice to stockman, 1003, note 32.
- Where stockman given directions to reach connecting train, path should not be made dangerous by operation of trains and engines, 1003, note 32.
- When person riding on "employe's pass" is regarded as a passenger, 1004.
- Not necessary to be upon vehicle to constitute one a passenger, 1005.
- Person who gives proper signal at flag station, in attempting to board train when it has stopped, is a passenger, 1005, note 35.
- Person giving proper signal for omnibus to stop in attempting to board vehicle is a passenger, 1005.
- But circumstances must show express or implied invitation of carrier, 1005.
- Merely going on board to inspect vessel, or to select or reserve berth, does not create passengership relation, 1005, note 37.
- General rule as to question when person waiting to take train is entitled to protection as passenger, 1006.
- Person holding round trip ticket who comes to station with return coupon for purpose of making return journey is a passenger, 1006, note 38.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Who are passengers—con.*

But to go to station three hours before train time is unreasonable, 1006, note 38.

Person who has purchased a ticket, in going to train under directions of station agent, is a passenger, 1006.

Person who wilfully waits until train has started and then runs after it is not a passenger, 1006.

Person who comes to station after last train has gone and waits there for his own convenience, is not a passenger, 1006.

Person merely on his way to station to take train not a passenger unless carried on carrier's vehicle, 1006.

Person who goes to station merely as spectator not entitled to protection as passenger, 1006.

Person may be passenger though received in vehicle before ready to start, 1007.

Prepayment of fare not always necessary, 1008.

When told by station agent to pay on train passengership relation exists, 1008, note 46.

When declaration by deceased person that he intended to take passage on defendant's train is admissible, 1008, note 46.

Injury while waiting but before purchase of ticket, 1009.

Is a passenger while coming to station on carrier's vehicle, 1010.

Person on platform waiting for train does not cease to be a passenger, 1011.

Injury to passenger on platform by objects thrown from passing train, 1011.

By piece of coal, 1011.

By stick of wood, 1011.

By mail bags thrown by mail agents, 1011.

By bundles thrown from express car, 1011, note 3.

Continues to be passenger though temporarily absent from vehicle, 1012.

Alighting from vehicle to send telegram, 1012, note 8.

Alighting from vehicle to obtain refreshments, 1012.

Alighting from train to transact passenger's own business, 1012, and notes.

Leaving train at intermediate point and going to hotel, 1012, note 9.

Distinction exists between passengers on through and local trains leaving vehicles, 1012.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Who are passengers*—con.

Does not cease to be passenger by assisting carrier in emergency, 1013.

Injury to passenger while helping conductor to care for sick fellow-passenger, 1013.

Does not cease to be passenger by remaining on train after reaching his original destination with intention to continue his journey to another point, 1014.

What elements must exist to create the passengership relation, 1015.

Mere intention alone, without other circumstances, not sufficient to prove its existence, 1015.

How long the relation of carrier and passenger continues, 1016.

Must be given opportunity to alight from train safely, and to leave carrier's premises in customary manner, 1016.

Mere fact that passenger gets off on wrong side of car does not make him a trespasser, 1016, note 23.

Person taking railroad track to his residence no longer a passenger, 1016, note 23.

If passenger voluntarily re-enters train for means of crossing to other side of track, he is but a trespasser, 1016, note 23.

Question whether passenger has failed to leave carrier's premises within a reasonable time is one for the jury, 1016.

If person delays an unreasonable time in leaving depot, he is no longer a passenger, 1016, note 23.

Peddler proceeding to section house some distance from station no longer a passenger, 1016.

Failure to leave train immediately on account of being asleep does not terminate passengership relation, 1016.

When obligation to carry imposed, direct contract not necessary to create liability, 1017.

Liability of carrier for injuries to mail agents, 1017.

Liability of carrier for injuries to servants, 1017.

Carrier cannot delegate its duties to an association for an excursion, and is liable for negligence, 1017.

Where contract for carriage void because made on Sunday, carrier liable for negligence, 1017.

In absence of contract to contrary, carrier must exercise same care and diligence for safety of one not a passenger but lawfully on train as for safety of passenger, 1018.

Duty of carrier toward express messengers, 1018.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Who are passengers—*con.

But contract that express messengers shall assume risk of all accidents or injuries in course of employment not against public policy, 1018.

Conflict of authority on question whether express messenger is chargeable with notice of terms of contract of express company and railroad company, 1018.

Duty of carrier toward porters on sleeping cars, news agents, fruit boys and lumbermen on log trains, 1018.

Carrier may waive prepayment of fare by passenger, 1019.

Passenger need only allege that he was ready to pay such a sum of money as carrier was legally entitled to charge, 1019.

Person accepted for carriage without payment or expectation of payment of fare as a passenger, 1020.

Children carried free are passengers, 1020.

But carrier must have knowledge that person or child is being carried free, 1020.

Infant cannot maintain action against carrier for injuries received before birth, 1020.

Same care and diligence due to gratuitous passengers as to others, 1021.

This rule based on the value which the law puts upon human life and safety, 1022.

Fare and its payment—

Amount that may be charged, 1023.

Statutes regulating, 1023.

Discriminations in, 1023.

Constitutionality of statutes requiring issuance of free transportation, 1023, note 2.

Carriers cannot collect more than legal fare, 1023.

How paid, 1024.

Carrier may require prepayment, 1024.

Passenger entitled to reasonable opportunity to pay, 1024.

Not bound to tender exact sum to carrier, who must furnish change to a reasonable amount, 1024.

Tender of coin worn smooth by use, 1024, note 11.

Tender of torn bills, 1024, note 11.

Carrier not obliged to accept passenger's jewelry as a pledge, 1024, note 11.

Who liable for fare, 1025.

Person traveling with child in his custody liable for payment of child's fare, 1025.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Fare and its payment—con.*

If carrier wrongfully ejects child, parent may get off also and recover for wrongful expulsion of both, 1025.

When brother or sister liable for payment of fare of other, 1025, note 12.

Paying in counterfeit money, 1026.

Effect of statutory requirement that conductor wear badge to show his authority to collect fares, 1027.

Tickets—

Are usually required of passengers, 1028.

May be in form of mere check, 1028.

Or in form of both a receipt and a contract, 1028.

If mere check passenger not bound to read conditions on back, 1028.

If ticket purports to be contract ticket, and evidently appears to be such, passenger bound by its stipulations, 1028.

Restrictions or limitations should be supported by consideration in shape of a reduced fare, or otherwise, 1028.

Reduced fare may put passenger on notice that ticket contains restrictions, 1028.

Passenger bound to comply with reasonable by-laws and regulations in reference to purchase of tickets, 1029.

Tickets must be sold without discrimination, 1030.

Discrimination in rates in favor of commercial travelers not justifiable, 1030, note 19.

Nothing illegal in giving rates to emigrants as a class, 1030, note 19.

If commutation rates offered, carrier cannot refuse to sell commutation ticket to particular individual, 1030.

Performance of duty to sell may be enforced by mandamus, 1030.

Effect of exchange of tickets on stipulations therein, 1031.

Passengers may be required to purchase ticket before entering vehicle, 1032.

And to exhibit it to gate-keeper, 1032.

But passenger must not be subjected to unnecessary inconvenience or annoyance, 1032.

Passenger may be required to pay higher fare when paid on train, 1033.

But cash fare, together with the extra amount, must not exceed the maximum rate allowed by law, 1033, note 28.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

Passenger refusing to pay higher fare on train may be ejected, 1033.

Immaterial whether other persons or the same person at different times have been allowed to ride on train for ticket fare paid on train, 1033, note 29.

But reasonable opportunity must be given passenger to purchase ticket, 1033.

Fact that process is created by which passenger may get back excess paid, does not justify carrier in demanding higher fare when no opportunity to purchase ticket is afforded, 1033, note 30.

Railroad company not bound, however, to keep ticket office open every minute of time until it may lawfully close the same, 1033, note 30.

Reasonable time depends on size of station, amount of business, etc., 1033, note 30.

Passenger cannot complain if he does not get to station until after usual time for departure of train, and finds ticket office closed, 1033, note 32.

Passenger entering train without a ticket cannot ask to have train held until he can procure one, 1033, note 32.

Subject regulated by statute in some states, 1033.

Passenger failing to purchase on account of premature closing of office, cannot be required to pay additional fare, 1033.

Paying such additional fare, may recover back, 1033.

Ejected on refusal to pay additional fare, may recover damages, 1033.

Higher rate cannot be demanded if agent is out of tickets, 1033, note 33.

Passenger cannot resume journey unless he pays for ride he has been permitted to take when he has been carried a distance without producing a ticket or fare, 1033, note 33.

Fact that wrongful ejection occurs on Sunday does not affect passenger's right to recover, 1033.

Waiver of right to demand higher fare when paid on train, 1034.

Carrier may abandon custom to sell tickets at reduced rates, 1035.

Regulation requiring conductor to expel passenger refusing to exhibit ticket, reasonable, 1036.

Passenger losing ticket may be required to pay fare, 1036.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

But reasonable time must be given passenger to find it, 1036.
Passenger leaving commutation ticket at home may be expelled for refusing to pay fare, 1036.

Ticket agent's declaration to passenger who has lost or mislaid ticket that it will be all right is not binding on carrier, 1036, note 39.

Passenger, subject to chronic drowsiness, may stop expulsion from car by production of ticket on realizing situation, 1036, note 40.

Time occupied in running from one station to another a sufficient opportunity for finding lost ticket, 1036, note 41.

Conductor not required to hear evidence as to *bona fides* of passenger's excuse for not producing ticket, or to telegraph to selling agent, 1036, note 41.

Conductor not bound to search passenger's pocket for ticket, but if he does so, must do it in good faith, 1036, note 41.

Passenger leaving ticket at home cannot leave cash deposit with conductor on condition of its return when he gets ticket, 1036, note 42.

Rebate or train tickets given on payment of cash fare must be produced when called for, 1037.

Regulation that ticket may be demanded in exchange for check, reasonable, 1038.

Passenger refusing to comply with, may be expelled, 1038.

This rule applicable to regulation that commutation tickets be surrendered on last trip, 1038, note 44.

But passenger cannot be compelled to surrender ticket without receiving evidence of payment of fare in return, 1038.

But having done so, cannot be expelled by another conductor, 1038.

In such case may recover compensatory damages, 1039.

When passenger pays for a ticket to a certain place, and agent by mistake issues ticket for shorter distance, carrier liable for expulsion, 1039.

Torn, soiled or mutilated tickets, 1040.

Journey once commenced must be continued without intermission, 1041.

Passenger cannot claim right to stop at any intermediate place, and continue journey on subsequent train, 1041.

In California, rule changed by statute, 1041, note 52.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

Ticket agent at intermediate station has no authority to waive rule of a continuous passage, 1041, note 52.

Conductor of one train need not recognize authority of conductor of another train to grant right of stop-over, 1041, note 52.

But passenger has reciprocal rights against company, 1041.

Passenger cannot knowingly take train which does not go to destination and tender ticket for fare, 1041.

Passenger who knows train will not stop at his destination cannot stop at earlier point and demand "stop-over" check, 1041.

Through passenger cannot claim the advantage of local excursion or competitive rates between intermediate points, 1042.

Ticket issued without limitation good within period prescribed by statute of limitations for similar contracts, 1043.

State legislature may enact that limitations to the contrary shall not be valid, 1043, note 1.

But carrier may otherwise limit time within which ticket shall be used, 1043.

Such a limitation construed most strongly against carrier, 1043.

What notice of limitations required, 1043.

Posting of notices in waiting rooms, etc., 1043.

Effect of selling tickets at reduced rates, 1043.

Some courts regard limitations as to time of use of ticket as regulations of the carrier and not as matters of contract, 1043.

Distinction, under view that they are matters of contract, between tickets which are mere tokens or checks and contract tickets, 1043.

Stipulation purporting to limit use of ticket to specified time construed as fixing latest time for commencing and not for completing journey, 1044.

Ticket good for certain date only not good for subsequent date, 1044.

Ticket good if passage begun before midnight of last day, 1045.

Fact that change of trains is necessary, immaterial, 1045.

If ticket expires on Sunday when no trains are run, it will be good for use on Monday, 1045.

Where time has expired, though by negligence of carrier, un-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

less passenger has started on journey, he should pursue his remedy against carrier for breach of contract, 1045.

But passenger should not suffer for any casualty or incapacity in the initial or any connecting line, 1045.

Carrier liable if second conductor refuses to honor ticket although first conductor has received instructions to do so, 1045, note 14.

Time limitation must be reasonable, 1046.

If unreasonable, passenger must avail himself of first opportunity to complete his journey under the contract, 1046.

"Good for one seat" means seat on same train upon which holder has once taken passage, 1046, note 17.

"Good for this trip only" has been held to relate to time of using ticket and not to date, and to mean trip must be continuous, 1046, note 17.

"Good for twenty days" only means for one continuous trip although twenty days have not elapsed, 1046, note 17.

Statute giving longer life to ticket than that expressed upon its face will not be given extraterritorial effect, 1046, note 17.

Carrier may waive time limitation by accepting ticket holder as passenger after expiration of time, 1047.

But waiver as to one ticket will not constitute waiver as to another, 1047.

Rule as to continuous carriage different in case of coupon tickets, 1048.

Coupon ticket does not usually import contract of through carriage, 1049.

Carrier issuing through ticket for transportation on route of connecting carrier, agent for latter, when, 258-261, 1048, 1049.

Not responsible for safety of passenger beyond his own line, 1049.

Or baggage beyond his own line, 1049.

Holder of coupon ticket may stop at end of each line represented by coupons, and resume within a reasonable time, 1049.

This rule has been extended to cases where passengers hold tickets having separate coupons for different divisions of same line, 1049.

But contract for through carriage may be made, 1050.

Railroad may, by its advertisements, treat entire journey over

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

- its own and connecting lines as entire trip for which it alone would be responsible, 1050, note 25.
- Railroad selling trip over connecting line to real terminus of its own road liable for negligence of connecting line, 1050, note 25.
- Railroad operating another line cannot escape responsibility for negligence by showing charter did not authorize such operation, 1050, note 25.
- Whether through contract exists is question of fact, 1050.
- Parol evidence of real contract admissible, when, 1050, 1052.
- When nothing shown but sale of ticket, presumption that carrier is responsible for his route alone, 1050.
- When net profits divided among successive carriers, liable as partners, 1050.
- When initial carrier liable for connecting carrier's failure to provide stateroom, 1050, note 29.
- When longer and shorter route, and route not designated in ticket, passenger should take shorter route, 1051.
- But usage to take longer route is valid, 1051.
- If ticket does not express the entire contract, it may be shown by other proof, 1052.
- Parol evidence to affect, 1052.
- Not defeated by regulations not known to passenger, 1052.
- Not defeated by limitations on back of ticket to which his attention was not called, 1052.
- Conditions in fine print on ticket, 1052, note 34.
- Distinction between tickets which are mere tokens and contract tickets, 1052.
- Reduced fare tickets, 1052, and notes.
- Conditions against allowing rebates, 1052, note 36.
- Against assuming responsibility beyond carrier's own line, 1052, note 36.
- Against carrying groceries as baggage, 1052, note 36.
- When statements of station agents are inadmissible to vary ticket contract, 1052, note 36.
- Person unable to read or write should make that fact known to agent, 1052, note 36.
- Language in ticket of uncertain or doubtful meaning taken in strongest sense against carrier, 1052.
- Passenger is bound by ticket contract, 1053.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

But negligence of carrier in failing to provide agents, or to provide agents with requisite facilities, or negligence of agents in performing their duties will excuse passenger, 1053.

Negligent omission of agent to stamp ticket, 1053, note 39.

Failure of carrier to provide agent with mileage exchange tickets, 1053.

Action must be brought against carrier through whose negligence injury occurred in case of coupon tickets, 1053.

Failure of company to keep station open longer than a reasonable time no excuse for passenger failing to comply with conditions, 1053, note 39.

Round-trip tickets requiring identification, 1054.

Effect of refusal of agent at terminal points to stamp, sign or validate tickets, 1054.

Effect of passenger's refusal to make proper proof of his identity as rightful holder of ticket, 1054.

Burden of proving identity is on passenger, 1054.

Agent of carrier not compelled to accept verbal assurance of passenger as to identity, 1054.

But passenger only required to offer such proof as would satisfy mind of a reasonably conscientious and prudent person, 1054.

Effect of provision that return passage shall commence on same day that passenger identifies himself, 1054, note 43.

Agent of carrier at destination cannot bind connecting carriers by assurance to passenger that journey can be commenced on later date than that in ticket, 1054, note 43.

Effect of passenger being unable to read or write, 1054, note 43.

Waiver as to conditions on ticket not presumed by gateman allowing passenger to pass through gate, 1054, note 44.

Nor from fact that other passengers have been allowed to travel without ticket validation unless custom or abandonment shown, 1054, note 44.

Provision that coupon shall not be good if detached, 1055.

Holder of mileage ticket cannot insist on tearing off coupons himself, 1055.

Unless waived by general custom between carrier and his passengers, 1055.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

Effect of parts of round-trip ticket being detached by accident, 1055.

Tickets transferable unless limited, 1056.

Provision that ticket shall not be transferable, 1056.

Non-transferable clause in commutation ticket valid, 1056, note 59.

Insertion of fraudulent names in non-transferable ticket, 1056, note 59.

Mileage book passes to personal representatives of deceased, and cannot be used in transporting his remains, 1056, note 59.

Effect of purchaser's offer to identify himself by signing his name to ticket, 1056, note 60.

Purchase of non-transferable ticket under assumed name, 1056, note 60.

Agent has no authority to waive non-transferable clause when stipulation in ticket against agent's authority to alter or modify conditions, 1056, note 60.

Non-transferable clause does not give carrier right to confiscate ticket, 1056.

Although express provision for confiscation may, 1056.

Second conductor may question person's right to ride on non-transferable ticket, 1056.

Injunctions against ticket-brokers dealing in non-transferable tickets, 1056.

Passenger should truthfully answer questions of conductor concerning his identity, 1057.

Provision that ticket shall not be good on certain trains, 1058.

Passenger holding ticket good on excursion train cannot ride on general train, 1058, note 3.

Ticket for freight train not good on passenger train, 1058, note 3.

Failure to connect with proper train of another road does not entitle second-class passenger to ride on limited express, 1058, note 3.

Passengers on branch lines who miss connections have no right to ride on limited or special trains on which ticket does not entitle them to ride, 1058, note 3.

Waivers by gatekeeper, 1058, note 3.

Railroad may run special limited trains for those desiring sleeping accommodations, 1058, note 4.

Passenger can go only in direction which ticket indicates, 1059.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

How where by mistake conductor tears off return coupon instead of going coupon of round-trip ticket, 1059, 1065, note 29.

How when train does not stop at passenger's destination, 1060.
Passenger bound to inquire if train stops at station to which ticket entitles him to ride, 1060.

If passenger boards wrong train after such inquiry, not obliged to pay for ride to first station at which train regularly stops, 1060.

But rule does not apply to holder of season ticket, 1060, note 7.
And such a passenger must pay fare beyond first regular stop, 1060.

Duty of carrier where passenger buys ticket to flag station, 1060, note 7.

Remedy of passenger where he is misled by statements of carrier or agents into taking train which does not stop at destination, 1060.

When connecting road not liable for representations of foreign ticket agents as to stopping places, 1060, note 9.

Proof should be confined to statements of agent contemporaneously with purchase of ticket, 1060, note 9.

Effect of marking ticket "Good for this day and train only," 1060, note 9.

"Good on passenger trains only" not a representation that all passenger trains stop at all stations, 1060, note 9.

Right of carrier to eject on refusal of passenger to leave train which does not stop at his destination, 1060.

Special contract for stopping train at particular station valid, 1060.

How when passenger is given obviously wrong ticket, 1061.

Rule where ticket apparently good is not sufficient under carrier's regulations, 1062.

Effect of agent being out of interchangeable mileage exchange tickets, 1062, note 19.

Fact that amount demanded was trifling cannot be considered in mitigation of damages where passenger refuses to pay additional fare wrongfully demanded, 1062, note 19.

Where ticket on its face entitles passenger to be carried, carrier cannot set up custom to issue such tickets on certain days only, 1062, note 19.

Purchase of ticket for wife by husband, 1062, note 19.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Tickets*—con.

Liability of separate carriers for acts of joint agent, 1063.

How where conductor on first line tears off coupon of second line, 1064.

As between passenger and conductor the ticket produced must govern, 1065.

Application of this rule does not extend to cases where ticket sufficient on its face and declared by agent to be good, but not good in fact according to carrier's regulations, 1065.

Duty of conductor where surrounding circumstances show it is probable ticket was issued by mistake, 1065, note 26.

Right of passenger to refuse to leave the car, 1065.

Rule in Michigan as to ejection of passengers on account of insufficiency of ticket, 1065.

Failure of conductor of first train to give passenger written evidence of right of stop-over, 1065, note 29.

Remedy of passenger who is not carried as agreed, 1066.

Passenger entitled to nominal damages at least for mistake of carrier's agent in inserting name in mileage book, 1066, note 31.

Remedy of passenger where carrier's agent misdirects him as to use of ticket, 1066, 1067.

Damages include compensation not only for increased expense, loss of time and inconvenience, but also for mortification, mental suffering and any indignities, 1066.

Effect of representation that no steerage passengers are carried on boat, 1067, note 36.

Passengers expected to exercise ordinary intelligence and prudence, however, 1067.

Carrier not bound by directions or information given by agent in matter not within scope of his authority, 1067.

Directions by conductor to passenger on leaving wrong train as to course he should pursue, not within scope of conductor's authority, 1067, note 40.

But direction by conductor to passenger as to his conduct on the train, or in getting off or on train, are within scope of his authority, 1067, note 40.

When directions of brakeman may be relied on by passenger, 1067, note 40.

Rights of passenger where his ticket has been purchased for him by third person, 1068.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—con.

Right of carrier to provide by contract against liability for injuries to passengers or to passengers' baggage—

Passenger carrier cannot limit his liability by notice or regulation, 1069.

Conclusiveness of acceptance by passenger of contract ticket, 1069.

Good faith required on part of carrier, 1070.

Presumption that passenger never assented to condition where any device resorted to to conceal it from him, 1070.

When limitation communicated to passenger for first time after he has paid his fare, no assent presumed, 1070, note 45.

Effect of failure to read limitation of liability for loss of baggage, 1070, note 45.

When limitation inures to benefit of connecting carrier, 1071.

Passenger carrier cannot contract against consequences of his own negligence, 1072.

Rule in Illinois, 1072, note 47.

Exemption against responsibility for its own or servant's negligence, provided it has used due diligence to make vessel seaworthy, is void, 1072, note 47.

Limitations of liability against carrier's or its agent's negligence in tickets for passage on freight trains, void, 1072, note 47.

Actual payment of cash fare not necessary to render stipulations against liability for negligence void, 1073.

Such stipulations void, where valuable consideration exists, even though passenger carried on "drover's" or "employee's" pass or any other ticket purporting to be a "free" pass, 1073.

Such passes not gratuitous, 1073.

Such stipulations sustained as to express messengers, sleeping car porters, and news agents, 1073.

No distinction as to degree of negligence, 1074.

Rule where free passes are issued on condition of no liability, 1075.

By statute in some states, passenger can recover for carrier's negligence, even though riding on free pass conditioned against liability, 1075.

In majority of states, carrier can contract against liability for negligence on free pass, 1075.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Right of carrier to provide by contract against liability for injuries to passengers or to passengers' baggage—con.*

Immaterial whether person reads conditions on pass or not, 1075.

Rule in case of infants riding on free pass, 1075.

Stipulations against liability for negligence on free pass must be express, 1075.

Carrier may enter into contract of indemnity with insurance company, 1076.

Passenger must conform to regulations of carrier, and may be ejected for refusal—

Obedience to reasonable regulations of carrier a condition of contract to carry, 1077.

Carrier assumes responsibility of reasonableness of regulation, and liable in damages if it is unreasonable, 1077.

Cannot expel passenger for violation of unessential rule, 1077.

Must make known regulations to passenger before resorting to expulsion, 1077.

When facts not disputed reasonableness of regulation a question of law for the court, 1077.

Regulations that passengers shall use only one seat or half a seat, or that backs of seats shall not be turned to face each other, or that baggage shall not be placed on seats, 1077, note 17.

Rule that baggage shall not be checked until ticket procured, reasonable, 1077, note 17.

Extra charges for admittance to chair cars, 1077, note 17.

Regulation against passenger acting as express messenger, 1077, note 17.

Regulation against passengers entering coaches earlier than thirty minutes before starting, 1077, notes 17 and 18.

Regulation against passengers going past conductor while collecting fares, 1077, note 17.

Regulations excluding dogs from passenger cars or requiring their carriage in baggage cars, reasonable, 1077, note 17.

Regulations requiring extra fare for passengers with packages too large to be carried on lap, 1077, note 17.

Regulation against passenger standing on car platform, 1077, note 17.

Regulation against carrying packages of merchandise or groceries into cars, 1077, note 17.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Passenger must conform to regulations of carrier, and may be ejected for refusal*—con.

Regulation requiring passenger to go by most direct route, 1077, note 17.

Regulation against wearing uniform cap of line of opposition steamers unreasonable, 1077, note 18.

Regulation that baggage master shall not receive baggage into baggage room until ticket procured, 1077, note 18.

Passenger not bound by regulation which contravenes the law, 1077, note 18.

Nor by void order of state board of health, 1077, note 18.

Regulation requiring payment to conductor in case of doubt of validity of ticket, void, 1077, note 18.

Carriers have undoubted right to protect themselves against wrong and imposition by reasonable regulations, 1078.

Passenger refusing to comply with essential regulation does not regain right to remain in railroad carriage by offering to conform after signal given to stop train, 1079.

But may take passage in another train on same road, 1079.

Regulations of carrier may be waived by usage, 1080.

For waiver through conduct of agent or employe, latter must have been acting within scope of his authority, 1080.

Authority of brakeman to waive regulations, 1080.

Carrier liable if wrong person expelled for breach of regulations, 1081.

Ejection of passenger for breach of regulations—

Passenger forfeiting right to carriage may be expelled at any point on the route, 1082.

Rule changed by statute in some states, 1082.

Passenger cannot be exposed wantonly to perils by ejection, 1082.

Rule in England as to ejection for non-performance of regulation, or non-payment of fare, 1082.

Ejection of females and sick or intoxicated passengers, 1083.

Regard must be had to the infirmities or disabilities of the person ejected, 1083.

Immaterial that condition was self-imposed, 1083.

Liability of carrier for assault on female passenger where ejected at station short of destination, 1083, note 13.

Carrier not liable if intoxicated person placed in position of safety, and afterwards wanders back on track and is killed, 1083.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Ejection of passenger for breach of regulations—con.*

Right to eject must be exercised in a proper manner, 1084.

Ejecting from slowly moving train not negligence *per se*, 1084, note 18.

Only such force as is necessary to be used, 1084.

Carrier liable for unnecessary force in expulsion, or circumstances of insult or indignity, 1084.

No greater damage because colored train hand assisted in expulsion of white man, 1084, note 19.

Ejection of colored man from white man's car, 1084, note 19.

Effect of tender after refusal to pay fare or show ticket, and ejection begun, 1085.

Cases not in harmony on this question, 1085.

Passenger cannot escape ejection by tendering fare for remainder of journey, 1085.

Or by buying ticket for remainder of way, 1085.

Rule justifying refusal to accept tender after ejection begun must be confined to cases where refusal was wilful, 1085.

Effect of tender of fare by third person, 1085.

Duty of carrier to tender back fare received before ejection, 1086.

Duty of carrier to tender back fare received when parent is ejected for non-payment of child's fare, 1087.

Duty of carrier to return ticket claimed to be void or worthless before ejecting passenger, 1088.

When and to what extent passenger may resist ejection—

When attempt made to expel from train in rapid motion, 1089.

When attempt made to expel wrongfully, passenger may repel by use of any necessary force, 1090.

Passenger not compelled to purchase, even for trifle, right which he already has under ticket, 1090, note 2.

Where passenger in wrong, and injured while resisting ejection, carrier not liable, 1090.

Whether due care has been used in expulsion, a question of fact, 1091.

Carrier not always liable when passenger expelled while train in motion, 1091.

Always necessary to slacken speed so as to prevent injury, 1091.

Conductor cannot testify he did not use more force than necessary, that being a question for the jury, 1091, note 8.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*When and to what extent passenger may resist ejection—con.*

Relation of carrier and passenger does not cease on wrongful ejection, 1092.

Passenger entitled to respectful treatment from carrier and his servants—

Passenger has right to claim absolute protection against assaults and violence of carrier's servants, 1093.

When assault by carrier's servant occurs on carrier's vehicle, carrier liable even though servant has seemingly departed from line of his duty, 1093.

Rule true in respect of carriers by water as in respect of carriers by land, 1093.

Liability of steamboat company for handcuffing passenger and subsequent ejection, 1093, note 13.

Liability of steamboat company for quarrelsome, violent and fighting crew, 1093, note 13.

Liability of railroad company for assaults on passengers by conductors, 1094.

For opprobrious and abusive language by conductor, 1094, note 15.

For conductor shooting boy in leg, 1094, note 15.

Liability of railroad company for assaults by brakeman, 1094.

Railroad company liable for assaults on passenger by porter of sleeping or drawing-room car, 1095.

Owner of omnibus liable for assault on passenger by omnibus guard, 1095.

Liability of carrier by water for assaults on passenger by clerk, steward, or mate of boat, 1096.

Exemplary damages allowed in such cases, 1097.

Early overruled cases in New York hold carrier not liable for assault by servant not acting in line of his duty, 1098.

Liability of carrier for assault by servants in station or before or after the existence of the relation of carrier and passenger, 1099.

In such cases carrier only liable for torts by servant in course of servant's duty, but not for acts of wilful misconduct, 1099.

Assault on female passenger by negress employed in depot, 1093, note 12.

Railroad liable where station agent kicked man down stairs under impression he was drunk, 1099, note 32.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Passenger entitled to respectful treatment from carrier and his servants—con.*

Liability of railroad company where station agent, after altercation, shoots passenger in thigh, 1099, note 33.

Liability of railroad company where person shot by baggage master during altercation, 1099, note 33.

Liability of railroad company for peace officer in station striking passenger with billy, 1099, note 34.

Liability of railroad company operating a union depot for assault on passenger by gate keeper, 1099, note 34.

Liability of railroad company for act of station agent in charging passenger with passing counterfeit money, calling her a prostitute and detaining her, 1099, note 34.

Liability of railroad company for injuries to passenger while servant ejecting a drunken man from station, 1099, note 34.

Liability of railroad company for injuries to passenger during friendly scuffle of carrier's servants on platform, 1099, note 34.

Liability of railroad company where passenger contracts smallpox from ticket agent, 1099, note 34.

Liability of railroad company for assault on passenger before leaving premises, 1099, note 34.

Liability of railroad company for assault on passenger by section boss, 1099, note 34.

Liability of carrier for wrongful arrest of passenger by carrier's servants, 1100.

Carrier liable for indecent assaults by its servants on female passengers, 1101.

Liable for assaults by conductor, porter, station agent or baggage master, 1101, and notes.

Effect of passenger provoking assault by immodest or improper remark, 1101.

Decent behavior on part of passenger also required, 1102.

If passenger assaults carrier's servant, latter has right to defend himself, 1102.

But words of provocation by passenger no excuse for assault by carrier's servant, 1102.

But proof of passenger's insulting language or violent conduct may be shown in mitigation of damages, 1102.

Time at which carrier must commence transportation—

In absence of express contract, passenger purchasing ticket not entitled to transportation at particular hour, 1103.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Time at which carrier must commence transportation*—con.

Implied agreement to commence journey within reasonable time and prosecute without unnecessary delay, 1103.

Must use diligence to conform to published schedules and notices, 1104.

Right of state railway commission to compel carrier to make connections with train of another company, 1104, note 19.

Changing schedule without notice to ticket agent who sells ticket, railroad liable to purchaser, 1104, note 19.

Holding train for accommodation of theater patrons, 1105.

Changing schedule to conform with schedule of connecting road, 1106.

Liability of carrier where train behind time is blown from track by sudden gust of wind, 1106, note 22.

Liability of carrier for failure to transport on account of washout on road, 1107, note 25.

What elements necessary to make carrier liable for failure to have train ready, 1107.

Passenger has no right to rely on statements of station agent as to exact time train is late, 1108.

Liability for detention of or injuries to passenger en route—

Carrier liable for detention caused by wilfulness or negligence of himself and servants, 1109.

Burden of proof on carrier to show cause of delay did not arise from his negligence, 1109.

In case of unavoidable delay, carrier must adopt all reasonable means for safety and comfort of passengers, 1109.

Duty of carrier to stop trains for passengers at regular or flag stations and at passenger platforms, 1110.

Statutes affecting, 1110, note 33.

Rule in regard to stopping of freight trains carrying passengers, 1110.

Passenger must be allowed reasonable opportunity to enter vehicle in safety, 1111.

Duty of carrier may include due and timely announcement of particular trains, 1111.

Train must be stopped a reasonable time, 1111.

Carrier liable for injuries to passenger due to negligently starting train while passenger is getting on, 1111.

Unless special reason, such as passenger's infirmity, exists, car-

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Liability for detention of or injuries to passenger en route*—con.

- rier under no duty to hold train until passenger is seated, 1111.
- But other cars must not be backed up against car on which passenger is proceeding to seat, 1111.
- Carrier liable for injuries to passenger due to extraordinary jerks and jars, 1111.
- On freight trains, sufficient time for passenger to reach a place of safety in caboose must be allowed, 1111.
- But carrier not liable for injuries due to jars and jolts usual to such trains, 1111.
- Passenger leaving train temporarily under conductor's directions, reasonable time must be allowed for him to effect purpose and return, 1111.
- Same true where stockman required to sign written contract before loading stock, 1111.
- When duty incumbent on carrier to render assistance to passengers boarding train, 1112.
- Carrier must furnish sufficient room and reasonable accommodations, 1113.
- Right of passenger to a seat before surrendering ticket, 1113.
- Duty of carrier as to accommodations when excursions advertised, 1113.
- But passenger cannot insist on riding free while standing, 1113.
- Extraordinary and unusual number of passengers will excuse carrier from accepting passengers, 1114.
- Use of baggage car for passengers, 1115.
- Carrier must allow customary intervals for refreshment and give notice of departure, 1116.
- Stopping for wood, carrier not bound to notify passengers before starting, 1116, note 66.
- Passenger must be put down at usual place of stopping, 1117.
- Passenger entitled to have train come to full stop, and not merely to slackening of speed, 1117.
- Rule with reference to stopping place of freight trains carrying passengers, 1117, note 1.
- Stopping at some distance from station platform on account of snow, 1117, note 2.
- Refusing to stop in retaliation on passenger for not giving carrier his business, 1117, note 3.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Liability for detention of or injuries to passenger en route*—con.

Conductor has no authority to promise passenger to stop at other than regular station, 1117.

Carrier must give sufficient time to alight, 1118.

Carrier liable if passenger carried to next station through being given insufficient time to alight, 1118.

Carrier liable for negligent start of conveyance while passenger alighting, 1118.

Not necessary to prove particular servant of carrier who caused the injury, 1118.

Carrier may show injury occurred through getting off moving train instead of sudden start, 1118.

Question of what is a reasonable time one for the jury, 1118.

Carrier not liable where reasonable time and opportunity given, but passenger has delayed, 1119.

Those in charge of train must not give signal for starting, however, when delayed passengers alighting in their presence, 1119, note 14.

Not liable where passenger has evaded payment of fare, 1120.

Carrier must give notice of arrival at stations, 1121.

Announcements should be intelligible, 1121, note 18.

Except where carrier's servants have notice of passenger's disability or infirmity, personal notice not required, 1121.

Sufficient if announcement be made by some employe other than conductor, 1121.

Carrier not liable for failure to announce where passenger soundly asleep, 1121.

Must be careful not to invite passenger to alight at improper time or place, 1122.

Not liable for mistaken impression of passenger that car has arrived at station, 1122.

Whether failure to provide stool is negligence is a question for the jury, 1122, note 26.

In absence of notice to passengers to the contrary, alighting places must be safe at both ends of car, 1122, note 26.

Mere announcement of station not always equivalent to invitation to alight, 1123.

Effect of train coming to a full stop after announcement of station, 1123.

Effect of announcement of station by stranger, 1124.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Liability for detention of or injuries to passenger en route*—con.

Duty of carrier to give counter warning when announcement made by stranger, 1124.

Effect of notice to passengers to take other cars, 1125.

Carrying passengers past platforms or stations, 1126.

Must return to give passenger opportunity to alight, 1126.

On refusal to return passenger entitled to compensation for trouble and inconvenience in getting back, 1126, note 3.

May have exemplary damages under aggravated circumstances, 1126, note 3.

Passenger chargeable with contributory negligence if he attempts to leave train while in motion, 1126.

Carrier not liable if sleeping passenger carried past station and robbed by footpads on way back, 1126, note 3.

If passenger carried past station, and conveyance started while he is alighting, carrier liable, 1126.

Where passenger required to leave car without assistance, and find way back to station unaided, carrier liable for injuries during that time, 1126.

This rule true even as to freight trains, 1126.

Not necessary that actual force be used in expelling passenger, 1126.

Liability of carrier for injuries to passenger by tripping over rails when train stopped away from platform, 1126, note 7.

Carrier not liable if passenger carried past station through passenger's own fault, 1126.

And passenger must use ordinary care to avert injuries, 1126.

Duty of holder of ticket to flag station to notify conductor of his destination, 1126.

Duty of carrier to afford assistance to passengers in alighting, 1127.

Duty to assist female passengers, or sick, aged or infirm passengers, 1127.

Duty of carrier to furnish portable steps, 1127, note 14.

Ordinarily no part of carrier's duty to awaken sleeping passengers, 1128.

But rule different in case of sleeping car, 1128.

Duty of carrier to furnish passengers necessary instructions, 1129.

Some consideration must be had for age, sex or condition of passenger where such is known to carrier, 1129.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—con.

Sleeping and parlor cars—

Sleeping-car companies not common carriers or innkeepers, but bound for reasonable care, 1130.

Rule under Interstate Commerce Act, page 574.

Negligence the test of liability, 1131.

Mere fact of loss of baggage does not raise any presumption of negligence, 1131.

But burden of proof on company to show it exercised reasonable care while passenger was asleep in protecting his property from theft, 1131.

Same degree of care not necessary when passenger is awake as when asleep, 1131, note 3.

Degree of care required when passenger sleeps in smoking compartment by permission of porter, 1131, note 3.

Obligation of company includes supplying car with sufficient servants of suitable capacity and experience, 1131.

Carrier liable when passenger's effects purloined by servants themselves, 1131.

Negligence in company to give porter such duties he cannot keep aisle continuously in view, 1131, note 4.

But, even when negligent, sleeping car company liable only for such reasonable baggage as passenger needs upon journey, 1132.

Company not liable for loss of pistol, 1132, note 7.

When liable for loss of mileage book, opera glasses, glass and brass compass, razor and strop, 1132, note 7.

Liability of sleeping car company for loss of money carried by passenger, 1132, notes 8 and 9.

Liability for loss of satchel, 1132, note 8, 1133, note 11.

Liability for loss of diamond ring, 1132, note 8.

Liability for loss of umbrella, 1132, note 9.

Company ordinarily not liable for loss of property under control of passenger, 1132.

Limitations of company's liability rest upon same rule as in case of passenger carriers generally, 1132.

Care due by company when passenger away from berth, 1133.

Rules applicable to sleeping car company apply also to parlor car company, 1134.

Railroad company liable as common carrier for loss of passenger's goods on sleeping car, 1135. /

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Sleeping and parlor cars—con.*

As between passenger and railroad company, servants of sleeping-car company are servants of railroad company, 1135.

Railroad company entitled to determine who shall occupy sleeping-cars, 1136.

Sleeping-car company not responsible for train connections, 1137.

When sleeping-car company liable for failure of sleeping-car to go over the same line of railroad that passenger's ticket calls for, 1138.

Duty of sleeping-car company to furnish berth, 1130.

Right of passenger to berth subject to reasonable rules and regulations of company, 1139.

Duty of sleeping-car company to furnish means for getting into or out of berth, 1140.

Passenger entitled to occupy only the berth he pays for, 1141.

Duty of servants of sleeping-car company to awaken passengers in time to alight, 1141.

Duty of sleeping-car company to ventilate and heat cars, 1143.

Duty of company to keep aisles clear from obstruction, such as valises, 1144.

Liability of sleeping-car company for assaults by its servants on passengers or for wrongful expulsion, 1145.

Liability for miscarriage of married woman due to expulsion, 1145.

Liability of sleeping-car company for baggage in custody of porter while lady passenger is leaving train, 1146.

Passenger carriers by water—

Are subject to general rules regulating other carriers, 1147.

Regulations respecting, prescribed by act of congress, 1148, *et seq.*

Penalties imposed for dangerous practices, 1149.

Regulations as to licensing officers, etc., 1150.

Statutory regulations as to safety, 1151.

Government of merchant vessels, 1152.

Regulations to prevent collisions, 1153.

Purpose of these statutory regulations, 1154.

Do not diminish carrier's responsibility for negligence, 1155.

Evidence of strict conformity to statutory regulations affords no presumption of due care, 1155.

Duty to furnish food and other necessities during voyage, 1156, 1157.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Passenger carriers by water*—con.

Effect of passenger voluntarily accepting poorer accommodations rather than not to make journey at all, 1156.

Reselling stateroom, 1156, note 4.

In absence of contract or usage to contrary, steerage passengers not entitled to be furnished bedding, 1158.

Carrying dogs in steerage cabin, 1158.

Authority of master of ship, 1159.

Passenger may be required to perform necessary services in case of extraordinary danger, 1159.

Master cannot require greater exertion or exposure of passenger than strictly necessary, 1160.

Passenger entitled to respectful and courteous treatment, 1161.

Master stands in *loco parentis* to minors and female passengers, 1162.

Duty to aid sick or disabled passengers, 1163.

Whether carrier by water bound to furnish a physician, *quaere*, 1163, note 17.

But errors, mistakes or negligence of ship's doctor not chargeable to carrier when no negligence shown in selecting him, 1163.

Passenger must conduct himself properly, 1164.

Master may coerce into good behavior or exclude from society of those whom he annoys, 1164.

Such power to be exercised with great care and only upon good grounds, 1164.

Duty of carrier by water to furnish berths, 1165.

When carrier by water liable for material delay in departure, or non-observance of schedule, 1166.

Carrier by water not bound to deliver telegrams addressed to passengers, 1167.

Passengers may refuse to be carried in unseaworthy ship, 1168.

Liability of carrier by water continues until passenger and his baggage are safely landed, 1169.

Not relieved from liability by provision in contract that landing shall not be deemed part of voyage, 1169.

Custom as to landing of passengers or their baggage must be reasonable, 1169.

Passengers must be given reasonable time to disembark with their stores, 1169.

When act of God will excuse non-performance of contract to carry passengers and their baggage, 1169.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Passenger carriers by water*—con.

Low water, unless utterly unforeseen and wholly unexampled, no excuse, 1169.

Liability where bay at passenger's destination is ice-bound, 1169.

In master's discretion as to how near he will approach the mouth of a river, 1169.

Presumptions as to negligence of passenger carrier—

Question of negligence of passenger carrier usually one of fact, 1411.

Burden of proof on plaintiff to prove negligence, 1411.

When negligence of carrier will be presumed, 1412, 1413, 1414, 1415.

Mere proof of accident, without more, not sufficient to raise presumption of negligence, 1412.

Circumstances attending accident must be shown, 1412.

If accident connected with means or instrumentalities of transportation, a *prima facie* presumption of negligence will arise, 1413.

Negligence presumed where injury caused by breaking down or overturning of vehicle, 1414.

Or by derailment of train of cars, 1414.

Or by collision between trains, 1414.

Or by an unusual jerk or jolt, 1414.

Or by parting of train, 1414.

Or by breaking down of bridge, 1414.

Or by falling of appliances within vehicle, 1414.

Or by obstruction placed by carrier too near track, 1414.

Or by spark from locomotive, 1414.

Or by block of coal thrown from engine, 1414.

Or by explosion of locomotive boiler, 1414.

Or by fall of gangway when carriage is by water, 1414.

Or by bursting of a steam drum, 1414.

Or by failure of boat's machinery to operate, 1414.

Or by breaking of machinery, 1414.

Or by collision of boat with bank, 1414.

Or by overturning of stage coach, 1414.

Or by horses attached thereto running away, 1414.

Or by breaking of axletree of coach, 1414.

But where injury is received by passenger while about carrier's premises, no presumption of negligence will arise, 1414.

[REFERENCES ARE TO SECTIONS.]

PASSENGER CARRIER—*Presumptions as to negligence of passenger carrier—*con.

No presumption of negligence will arise where accident causing injury to passenger is to him and not to vehicle, 1414.

Or where injury is caused by passenger stepping on object on station platform when alighting, 1414.

Or where injury is caused by rock becoming detached from adjoining hillside and striking train, 1414.

Proof of injury usually makes *prima facie* case of negligence, 1415.

Carrier, to rebut presumption of negligence, must show that accident was inevitable, or that same could not have been avoided by exercise of utmost care and foresight, 1415.

But where plaintiff proceeds to show just how accident happened, instead of resting on facts which would establish a *prima facie* case against carrier, his testimony must prove that accident was due to negligence, 1415.

Presumption of negligence under statute of Georgia, 1413, note 51.

Under statute of Nebraska, 1413, note 52.

Presumption of negligence, held not to arise where passenger has assumed risk of all injury, 1416.

PASSENGER TRAFFIC—

Discrimination may be in passenger service, as well as property, under Interstate Commerce Act, 541, 558.

Party rates, 543.

PASSENGER TRAIN—

Sending goods forward by freight train, instead of by passenger train as stipulated, defeats contract of exemption, 480.

Collision of passenger and freight trains, 923.

Management of passenger trains, 924, *et seq.*

Duty to avert injury from obstructions, 925.

Speed of passenger trains, 926.

Duty of carrier as to doors and windows on, 927.

Vestibuled trains, 927.

Ticket for freight train not good on passenger train, 1058, note 3.

PASSING FROM CAR TO CAR—

Passing from car to car while train in motion, not contributory negligence unless danger is obvious, 1192.

Passenger voluntarily passing from car to car when train in rapid motion, chargeable with contributory negligence, 1192.

[REFERENCES ARE TO SECTIONS.]

PASSING FROM CAR TO CAR—con.

Passing from car to car when train in motion, not contributory negligence when passenger invited to do so by agent acting in line of duty, 1192.

Passenger passing from car to car when train in motion in search of water to drink, not chargeable with contributory negligence, 1192.

Passenger passing from car to car when train in motion, not chargeable with contributory negligence where train provided with vestibules, unless danger obvious, 1193.

PAYMENT—

Whether acceptance of part payment for goods is a waiver of claim against carrier for damage to remainder, 678, note 44.

PAY TRAIN—

Passengers may be excluded from, 964.

PEACE OFFICER—

Striking passenger, liability of carrier, 1099, note 34.

“PECUNIARY”—

Meaning of word, 1397.

PENAL STATUTES—

Regulating rates are strictly construed, 575.

PENS (See LIVE ANIMALS)—

When placing in pens a delivery to carrier, 105, 114.

Duty of carrier to provide pens, 510.

Pens must be kept in order, 510.

Initial carrier liable for injury sustained by animals in pens although injury does not develop until they have passed into the possession of a connecting carrier, 510.

PERFORMANCE—

When performance wholly within one state, the law of that state governs the contract of carriage, 202.

Better rule is that performance of contract of carriage is indivisible, 210.

Some states hold otherwise, 211.

War acts as legal prohibition on performance of contract of carriage, 322.

Embargo does not, 322.

Failure of shipper to furnish caretaker for live stock does not exonerate carrier from performance of contract of carriage, 642.

[REFERENCES ARE TO SECTIONS.]

PERIL—

- Where passenger reasonably believes he is exposed to, not necessarily negligence for him to alight from moving train, 1180.
- Passenger endeavoring to escape peril produced by negligence of carrier not chargeable with contributory negligence, 1223.
- But to justify passenger in encountering danger to escape such peril, there must be reasonable cause for alarm, 1224.
- Fear of slight injury, not sufficient to justify passenger in encountering risk of greater injury to avoid it, 1224.
- Conduct of passenger, in endeavoring to escape peril, must be viewed in light of circumstances as they appeared to him at time he sought to escape, 1224.
- Evidence of what other passengers said and did in excitement of moment, properly admissible, 1224, note 3.
- Where life of passenger in imminent peril, passenger may rely on directions of agent ordinarily without authority to direct passengers, 1222.

PERILS OF THE SEA—

- Excepted by Harter Act, 384.
- Defect in propeller held to have arisen from perils of the sea, 384, note 6.
- Perils of the sea not synonymous with acts of God, 483.
- When collision between vessels a peril of the sea, 483.
- Casualty avoidable by reasonable skill and diligence, not within exception, 483-487.
- Mistake of master as to signal lights, 484.
- When jettison is a peril of the sea, 485.
- Hidden obstructions, 486.
- Breaking of rope, 487.
- Inrush of water through explosion of blasting caps, 488.
- Rats gnawing hole in water pipe, 488.
- Ventilators carried away by gale, 488.
- Negligent caulking of hatches, 488, note 56.
- Storm breaking foreboom and parting anchors from chain, 488, note 56.
- When loss of logs is peril of sea, 488.
- Giving way of stanchion, 488.
- Losses by fire not within exception, even where motive power furnished by fire, 489.
- Explosion of boiler not a peril of the sea, 489.
- Escape of steam, 489.
- When loss of cattle is a peril of the sea, 489.

[REFERENCES ARE TO SECTIONS.]

PERILS OF THE SEA—con.

When motion of vessel is a peril of the sea, 490, note 65.

Damage from coal dust not a peril of the sea, 490, note 65.

Injury to vessel from rats, 490, note 65.

Shipping water, 490, note 65.

Breaking tiller rope, 490, note 65.

Desertion of seamen, 490, note 65.

Burden of proof on carrier to show loss to be within exemption, 490, note 65.

Carrier liable, notwithstanding exception against perils of the sea, for loss by theft, embezzlement, robbery, mobs, etc., other than pirates, 491.

Carrier liable, notwithstanding exception against perils of sea, when loss caused by negligence, 492.

Where master neglects usual precautions, 492, note 70.

Entitled to freight, though the goods have become worthless through perils of the sea, 802.

PERISHABLE GOODS—

Duty of initial carrier when goods are perishable, 130, 132.

Carrier not liable for losses from natural decay or deterioration of perishable fruits, 334.

Vessel without special appliance is unseaworthy as to perishable cargo, 366.

Should be protected from heat or cold by being carried in ventilated or refrigerator cars, 505.

Duty of carrier to avert injury to goods when vessel is disabled, 645.

Preference may be given in carriage to perishable goods already received, 649.

Carrier bound to transport perishable property immediately, 652, note 20.

Liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.

Duty of carrier by water as to delivery of perishable goods, 688, note 12.

Sale of perishable goods by carrier, 787.

PERSONAL DELIVERY (See DELIVERY)—

Generally carrier must make personal delivery to person entitled to receive goods, 666.

To excuse delivery to other person, must bring himself within exception by showing long-continued and well-understood usage, 666.

[REFERENCES ARE TO SECTIONS.]

PERSONAL DELIVERY—con.

When personal delivery required, duty of carrier to seek consignee and tender goods to him, 667.

If consignee not there, reasonable diligence must be used to find him, 667.

Carriers by water and by railway not required to make personal delivery, 687, 701.

Express companies required to make personal delivery, 716.

But personal delivery may be excused at small stations, 717.

Or the company may establish limits in a city beyond which it will not go, 717.

How far usage may affect duty to make personal delivery, 718, 719.

Whether carrier who is bound to make a personal delivery must give notice of a refusal of the goods by consignee to consignor, 720.

PERSONAL REPRESENTATIVES (See **EXECUTORS** and **ADMINISTRATORS**)—

PHYSICIAN—

Duty of carrier by water to furnish, 1163.

PICKPOCKET—

Cannot be ejected without act of misbehavior, 975.

PIER—

Destruction of goods through collapse of pier, 689, note 14.

Leaving baggage on, without directions, gives no maritime lien on vessel for its loss, 120.

"PILING UP"—

Carrier should prevent hogs from, 634, note 36.

PIPE LINES—

Under Interstate Commerce Act, 524.

PIPES—

Care to be taken of water and steam pipes in vessel, 374.

When damage to pipes will be a fault in the "management" of a vessel, 382, note 1.

When failure to test pipes will be a fault in the "management" of a vessel, 382, note 1.

PIRATES—

Are public enemies, 316.

Whether loss by pirates is a peril of the sea, 490, note 67; 491.

[REFERENCES ARE TO SECTIONS.]

PISTOL (see FIREARMS)—

When baggage, 1246.

PIT—

Near customary landing place, passenger injured by falling into, not chargeable with contributory negligence, 1186.

PLACE OF DELIVERY—

When place of delivery may be changed, 193-196, 660, 661, 735, 736.

Change cannot be made after transportation completed, 737.

PLACE OF SHIPMENT—

Conflict of authority on contracts limiting liability to value of goods at time and place of shipment, 430.

Effect of such a clause on the carrier's right to take the benefit of insurance procured on goods by shipper, 784, note 16.

PLATFORM OF CAR—

Carrier not liable where passenger, without carrier's fault, walks off platform of standing car, 900, note 25.

Liability of passenger carrier for obstructions on car platform, 911.

When carrier liable for excessive speed although passenger was standing on car platform, 926, note 26.

Snow, ice, vomit or mud on car platform, 957.

Negligence of passenger in boarding train while in motion no excuse for pushing him from, 1183.

Regulation against passenger standing on car platform, 1077, note 17.

Passenger voluntarily and without necessity riding upon, chargeable with contributory negligence, 1197.

Passenger standing upon, while train in motion, after request by conductor to go inside, chargeable with contributory negligence, 1197, note 34.

Passenger riding upon, in violation of company's rules which are known to him, chargeable with contributory negligence, 1197, note 34.

Modern improvements have largely modified risk of standing upon, while car in motion, 1197, note 35.

Standing upon, while car in motion, no bar to recovery where it does not contribute to injury, 1197.

Riding upon, not contributory negligence where passenger is directed to do so by company's servants, 1197.

[REFERENCES ARE TO SECTIONS.]

PLATFORM OF CAR—con.

But where danger is obvious, invitation or direction by company's servants, no excuse, 1197.

Where passenger invited or directed by company's servants to ride upon, question of his negligence is for jury, 1197.

Riding upon, not necessarily contributory negligence where passenger induced to do so by conduct of carrier's servants, 1197.

Riding upon, whether contributory negligence, held question for jury, 1197, note 37.

Riding upon, when car full, not contributory negligence as a matter of law, 1198.

But passenger must exercise for his safety, when so obliged to ride upon, a degree of care commensurate with danger, 1198.

Notice forbidding passengers to ride upon, deemed waived when passengers received, and there is not sufficient room inside, 1198, note 39.

Cases holding passenger not chargeable with contributory negligence in riding upon, when no vacant seats inside, 1198.

Better rule is that if there is standing room within car, passenger should avail himself of it, 1198.

But passenger not required to disregard usual courtesies of life in order to secure place within car; 1198.

Direction by conductor to go inside should be obeyed, 1198, note 42.

Passenger made sick by conditions within car, not negligence for him to go upon platform, 1198, note 42, 1199.

Riding upon, in order to better escape impending danger, not negligence as a matter of law, 1199.

PLATFORMS OF STATIONS—

Common carriers—

Duty of common carrier to provide, 510.

Passenger carriers—

Railroad must construct platforms which will form safe and convenient means of exit to and from cars for all passengers, 933.

Law does not determine of what material platform must be constructed, 933, note 26.

As a general rule, no imputation of negligence where platform for years has proved adequate, safe and convenient, 933, note 26.

When evidence as to unsound condition of platform at points

[REFERENCES ARE TO SECTIONS.]

PLATFORMS OF STATIONS—*Passenger carriers*—con.

- other than where accident occurred is competent, 933, note 26.
- Negligence to construct platform so far below lowest car steps that passengers must make dangerous leaps, 933.
- Female passenger not compelled to turn around and let herself down backwards, 933, note 27.
- Constructing platform 26 inches below level of lowest car step is negligence, 933, note 27.
- But 18 inches not negligence *per se*, 933, note 27.
- Whether platform was sufficiently elevated is a question of fact relating to "foresight" and not "hindsight," 933, note 27.
- May be negligence to require passenger to alight on small box on ground, 933, note 27.
- Negligence to have such a space between station and car platform that passengers may fall between them and be injured, 933.
- Constructing platform between tracks so narrow that passengers must stand dangerously near train is negligence, 933.
- But not required that platform be so constructed that nearest edge is safe as standing place while trains are passing, 933.
- When evidence may be introduced that witness had met with accident at same place, before happening of accident to plaintiff, 933, note 28.
- Question of negligence in construction of platform is usually one for the jury, 933.
- Negligence to maintain platform with dangerous slope toward lower track platform, 933.
- Existence of hole in platform, after knowledge of its condition, is gross negligence, 933.
- When evidence of holes allowed by carrier to exist in platform some time before passenger's injury is inadmissible, 933, note 33.
- When it is negligence to leave uncovered water box set in ground where train usually stops, 933, note 33.
- Railroad company not liable for mere accidents to passenger on safe platform, 933.
- Nor where passenger, when injured, was using platform for purpose for which it was not adapted, 933.

[REFERENCES ARE TO SECTIONS.]

PLATFORMS OF STATIONS—*Passenger carriers*—con.

Railroad company not bound to provide platform away from station for persons attempting to board train while in motion, 933.

Nor for persons who accidentally fall from train, 933.

Passengers must use platforms intended for them, 934.

When injured on platform, or part of platform, used exclusively for freight, railroad company not liable, 934.

Railroad bound to keep platform of station free from obstructions, 935.

Every indulgence of carrier in permitting objects to remain on station platform not necessarily negligence, 935.

If depot platform used for freight, carrier must exercise degree of care commensurate with the added danger, 935.

Leaving empty milk cans on platform, 935, note 1.

Ordinarily question whether due care has been used is one for jury, 935.

Negligence for railroad company to permit platforms to remain covered with snow and ice so as to be unsafe for alighting passengers, 935.

Snow or ice should be removed, or salt or ashes scattered over them, 935.

May be negligence to permit mail bag to remain on platform, 935.

Railroad liable for negligently leaving hose, trucks or skids in dangerous position, 935.

Accumulations of oil or grease on station platform may be negligence, 935.

Liability of railroad company where obstruction on platform is due to third persons, 935.

Liability for banana skins on platform, 935.

Liability for careless handling of truck by baggage master, 935, note 6.

Railroad company not liable for accidental tripping of passenger over foot of baggage master, 935.

Platform and station must be well lighted, 936.

Carrying passengers past platforms, 1126.

Leaving or entering train elsewhere than on station platform where one is provided, 1184.

Where railway company has provided platform, negligence for passenger to get on or off on opposite side, 1184.

Or for passenger to avail himself of such facilities, 1184.

[REFERENCES ARE TO SECTIONS.]

PLATFORMS OF STATIONS—*Passenger carriers*—con.

Passenger rushed from platform by crowd of impatient passengers, not chargeable with contributory negligence for attempting to board train from opposite side, 1184.

Passenger who voluntarily leaves depot platform and stands between tracks, chargeable with contributory negligence, 1184, note 21.

Effect of carrier's acquiescence or directions, 1185.

Custom established by railway company of putting off passengers on side opposite depot platform, passenger leaving train on that side not chargeable with contributory negligence, 1185.

But passenger must have had knowledge of custom, 1185.

Alighting from train on side opposite depot platform, not negligence *per se* where passenger is directed to do so by conductor, 1185.

Steps placed by conductor on side opposite depot platform, passenger using, not chargeable with contributory negligence, 1185, note 26.

Leaving or entering train at place where no platform is provided, 1186.

Passenger voluntarily attempting to alight at place where no facilities are provided, chargeable with contributory negligence, 1186.

But where custom established by railway company of discharging passengers at place where no platform is provided, passenger alighting in accordance with, not chargeable with contributory negligence, 1186.

Passenger alighting away from depot platform, not chargeable with contributory negligence when directed to so alight by agent acting in line of duty, 1186.

Custom established by railway company of receiving passengers at place other than depot platform, passenger attempting to board train in accordance with, not chargeable with contributory negligence, 1186.

Under such circumstances, question whether passenger chargeable with contributory negligence for jury, 1186, note 32.

Negligence in railway company to leave ground where passengers are in habit of boarding train in dangerous condition, 1186.

Passenger injured by falling into pit near customary land-

[REFERENCES ARE TO SECTIONS.]

PLATFORMS OF STATIONS—*Passenger carriers*—con.

ing place at night, not chargeable with contributory negligence, 1186.

But evidence that some people have boarded train at point away from depot platform, not sufficient to establish custom, 1186, note 32.

Passenger attempting to board train at point away from depot platform, not chargeable with contributory negligence when invited to do so by agent acting in line of employment, 1186.

Passenger attempting to alight at unusual place when train has stopped short of or has overshot platform, chargeable with contributory negligence, 1187.

Circumstances excusing such conduct, 1187.

Calling name of station, as excuse, 1187.

Invitation to alight by carrier's servant, as excuse, 1187, note 35.

Passenger using way for leaving or entering vehicle not intended for that purpose, chargeable with contributory negligence, 1188.

Passenger going around freight train to reach depot, chargeable with contributory negligence, 1188.

Using unsafe platforms on depot premises, 1207.

Omission to look for obstructions placed by carrier upon depot platform, not necessarily contributory negligence, 1207.

Using other parts of platform than those lying immediately between entrance thereto and place intended for passengers to board train, not contributory negligence, 1207.

If passenger makes use of platform which he knows to be in dangerous condition, a failure to exercise care proportioned to risk will be contributory negligence, 1207.

PLEADINGS—

Against carrier of goods—

Important to determine if plaintiff's declaration be in case or *assumpsit*, 1333.

What declaration must allege, 1334.

Declaration must correctly state particular duty assumed by carrier, 1334.

Plaintiff may rely on more general statement when he proceeds *ex delicto*, 1334.

[REFERENCES ARE TO SECTIONS.]

PLEADINGS—*Against carrier of goods*—con.

But if plaintiff enters into detailed statement of cause of action, proof must not vary from such statement, 1334.

In action *ex delicto*, allegation of undertaking to carry two or any number of things will support plaintiff's case if proof show an undertaking to carry one of them, 1334.

Declaration by consignor must allege ownership, 1334, note 1.

Declarations in particular cases, held sufficient, 1334, note 1.

Declarations in particular cases, held not sufficient, 1334, note 1.

When action on contract it must be set out correctly, 1335.

When action on contract it must be proven exactly as laid in declaration, 1335.

But contract need not be set out *in haec verba*, 1335.

Example of particularity in declaring on contract, 1336.

Variance between declaration and proof, fatal, 1337.

If declaration on contract state it to be absolute, and proof shows it to have been in alternative, plaintiff cannot recover, 1337.

Where contract is in alternative, it must be so stated, 1337.

Where declaration alleges contract was made with plaintiff and proof shows contract was made with another, plaintiff cannot recover, 1337.

Whole contract must be stated, 1338.

When action on contract containing limitations of liability, they must be stated, 1338.

Reasons for requiring particularity in statement of contract, 1339.

When suit on contract, mere collateral stipulations need not be set out, 1340.

Pleadings in action for statutory penalty for excessive overcharge, 1341.

Must state facts which bring case within statute, 1341.

Obligation arising under the statute should be stated, 1341.

How common-law action for excessive charge is affected by statutory action, 1342.

Common-law remedy for excess of reasonable charge not suspended by statute imposing penalty for making such charge, 1342.

This not true where common-law remedy is expressly repealed, 1342.

[REFERENCES ARE TO SECTIONS.]

PLEADINGS—*Against carrier of goods*—con.

What is sufficient averment of overcharge at common law, 1343.

Statement as to carrier's reward or compensation, 1344.

Not necessary to aver consideration in declaring for loss of goods, 1344.

But usual to allege that goods were accepted for carriage for certain reward, without stating what it was, 1344.

In action for refusing to accept goods, only necessary to aver readiness to pay freight, 1344.

In such case, allegation of tender unnecessary, 1344.

In absence of statute, carrier must plead according to rules of common law, 1345.

If action is in case, plea of general issue of not guilty usually sufficient, 1345.

In action on contract, plea of general issue of *non-assumpsit* usually sufficient, 1345.

Forms of pleading now generally regulated by statute, 1345.

Under modern codes of practice, carrier required to answer somewhat more minutely and specially, 1345.

Against passenger carrier—

Special damages must be pleaded, 1409, 1410.

PLEDGE—

Rights of a pledgee of a bill of lading on exercise of vendor's right of stoppage *in transitu*, 762, note 10.

Lien of carrier has precedence over pledgee who has procured the property to be transported and stored, 872, note 46.

PLUMBAGO—

Improper stowage of, 354, note 24; 606, note 30.

POCKETBOOK—

Left in sleeping car, liability of company for loss of, 1132, note 8.

POLICE POWER—

Carrier not liable for destruction of goods by, 325.

See PUBLIC AUTHORITY.

Non-delivery by carrier excused if goods are obnoxious to police power of state, 756.

POLITICAL OCCURRENCES—

Charterer may guard against delay by, in charter party, 841.

Political occurrences which prevent the charterer from procur-

[REFERENCES ARE TO SECTIONS.]

POLITICAL OCCURRENCES—con.

ing a cargo, but not from loading, do not not relieve him from liability for demurrage, 841.

POOLING OF FREIGHTS—

Under section five of Interstate Commerce Act, pooling of freights and division of earnings forbidden, 523.

PORT—

Railroad cannot build up one port at expense of another by preferential rates, 555.

Goods lost before ship leaves, measure of damages is value at port of departure, 1360, note 26.

PORT CHARGES—

In England, carrier's lien does not include, 866.

PORTER—

Carrier not liable where passenger, jumping on moving train, comes in contact with porter and is injured, 900, note 25.

Duty of carrier toward porters on sleeping cars, 1018.

May contract against liability for negligence towards, 1073.

Baggage in custody of, while lady passenger leaving train, liability of sleeping-car company for, 1146.

PORTS—

Whether an unfastened port renders vessel unseaworthy, 373.

When error in closing ports will be a fault in "management" of ship, 382, note 1.

POSSESSION—

By carrier, creates special property in him, 779.

May sue in his own name for injury to goods or for possession when wrongfully withheld, 779.

Goods stolen from, sufficient to allege property in carrier, in indictment, 779.

Carrier's right of action not inconsistent with right of action for same cause by general owner, 780.

But recovery by carrier for full value bars action by general owner, 780.

Carrier recovering full value, trustee for owner, 780.

Satisfaction of judgment for full value passes title to property to party against whom recovery is had, 780.

Carrier paying for property lost or destroyed while in his possession, by wrongful act of another, subrogated to owner's rights, 781.

[REFERENCES ARE TO SECTIONS.]

POSSESSION—con.

Carrier may recover possession from owner if taken from him wrongfully, 782.

Or when he has agreed to hold for party having paramount title, 782.

In trespass or trover against bailor, damages limited to value of special interest, 782.

Carrier's lien nothing more than a right to retain possession of goods until carrier's charges have been paid or tendered, 864.

Owner has no right to demand possession of goods until he has paid or tendered payment for carrier's service and advances, 864.

Carrier may retake possession of goods when consignee obtains them by trick or fraud, 871.

POSTAL CARD—

Sufficiency of notice sent by express company by, of arrival of goods, 717, note 12.

POSTAL CLERK (See MAIL AGENT)—

Riding in baggage car, when off duty, according to custom, not *per se* negligent, 1200, note 4.

POSTHUMOUS CHILDREN—

Recovery by, in actions for death by wrongful act, 1395.

POSTMASTERS—

And other persons in mail service, not common carriers, 94.

POTATOES—

Sending potatoes by other than designated route, 617, note 62.

POULTRY—

Duty of carrier as to care of dressed poultry during transportation, 631.

POWDER—

Labelling a car "Powder" may be such negligence, although it contains no powder, as will render railroad company liable for loss to other goods held by railroad as warehouseman, 714, note 4.

PREFERENCE—

Private carrier may show preference as to those whom he will serve, 45.

Carrier must not show preference, 512.

Difference in situation of shippers may justify a preference, 513.

Giving preference to one connecting carrier over another, 519.

[REFERENCES ARE TO SECTIONS.]

PREFERENCE—con.

Giving preference to one shipper over another, 520.

What amounts to unlawful discrimination, 521.

The English rule, 522.

Text of Interstate Commerce Act, 523.

Shippers must be placed on an absolute equality under the Interstate Commerce Act, 539.

Questions of undue preference are questions of fact, 553.

See COMMON CARRIER; DISCRIMINATION; INTERSTATE COMMERCE ACT; RAILROAD COMPANIES; STATE REGULATION OF RATES; TRANSPORTATION.

Preference may be given in carriage to perishable goods already received, 649.

Or to goods intended for some great public need or necessity, as the Chicago fire, 649.

So preference may be given to preservation of life, 650.

PREGNANCY—

Care due pregnant animals, 636.

Fact that injury to female passenger would not have happened had she not been pregnant, no excuse to carrier, 1432.

PREPAYMENT—

Carrier may demand prepayment of freight, 150, 799.

Even of one connecting carrier without demanding it of other connecting carriers, 519.

Requiring prepayment of freight by connecting carrier is not unjust discrimination under Interstate Commerce Law, 567.

Authority of agent to waive prepayment of freight must be shown, 799, note 12.

When shipper may recover freight paid in advance, 830, 831.

Parties may agree that freight may be due before carriage complete, 831.

Prepayment of fare not always necessary to constitute one a passenger, 1008, 1019.

PRESERVATION OF GOODS—

The degree of diligence to be exercised by the carrier when the goods have been overtaken by disaster, 309, 310, 311.

In case of accident, carrier must give goods reasonable care and attention, 631-633.

Duty of carrier in general to avert injury to the goods transported, 645, 646.

But the carrier is not bound to suspend his voyage to preserve the goods, 647.

[REFERENCES ARE TO SECTIONS.]

PRESERVATION OF LIFE—

Preference may be given over transportation of goods, 650.

PRESS OF BUSINESS—

May justify refusal of carrier to accept goods, 146, 495.

On unexpected influx of business, facilities should be equitably apportioned among shippers, 495.

Mere rush of business no excuse for failure to transport with reasonable dispatch, 651, note 14.

But press of business through unusual causes or causes beyond control of carrier may justify delay, 654.

PRESUMPTIVE EVIDENCE (See also, BURDEN OF PROOF)—

Carriage of goods—

When gratuitous bailee loses his own goods simultaneously with those of another, due diligence presumed, 28, 30.

This presumption not conclusive, 29.

Gratuitous bailee presumed to have done his duty, 31.

Failure to deliver goods by gratuitous bailee, unaccounted for, gross negligence presumed, 31.

When negligence will be presumed in management of passenger elevators, 102.

Bill of lading *prima facie* evidence of contents, 158.

Consignee is presumptively the owner of the goods, 177, 735.

Law of the place where the contract is made presumed to govern in the majority of cases, 201.

Same presumption holds as to validity of limitations of carrier's liability, 212.

Presumption exists that that law applies which is most favorable to the validity of the contract, 213.

Facts extrinsic of presumptive evidence may be considered by court to determine what law governs, 214.

Explosion of boiler presumed to be from negligence, 281.

Presumptions in favor of ship-owner not destroyed by Harter Act, 267.

Vessel unable to withstand swells of passing vessel presumed to be unseaworthy, 369.

Steamer capsizing soon after leaving port presumed unseaworthy, 369.

Presumption of unseaworthiness when leaks soon happen in ordinary weather, 370.

[REFERENCES ARE TO SECTIONS.]

PRESUMPTIVE EVIDENCE—*Carriage of goods*—con.

No presumption of unseaworthiness because decks or hatches leak after a continuous gale, 371.

But improperly caulked decks or hatches may make vessel unseaworthy, 371.

Gross negligence of master will raise presumption of negligence in his selection, 381.

Absence of look-out affords no presumption that vessel was improperly manned, 381.

Carrier's compensation presumed to include consideration for limited liability, 475.

Jury entitled to presume negligence where carrier fails to deliver and exemptions cannot avail, 477, note 22.

Carrier *prima facie* liable when goods damaged by escape of sparks from engine, 503.

That state legislature has deprived itself of the power to fix a reasonable maximum rate will not be presumed, 574.

When adverse title set up to property, carrier presumptively holds for his employer, 749.

Parties presumed to have contracted with knowledge of necessity for customs detention, 755.

Consignee *prima facie* liable for freight, 807.

Presumption as to consignee's liability may be rebutted, 808.

Where demurrage days provided for and a rate of demurrage agreed on, that rate is *prima facie* the standard for measuring shipowner's loss, 832.

Stipulated rate agreed on for delay in delivering cargo to vessel in *prima facie* evidence of loss by an unexcused delay in loading, 832.

Presumption exists in favor of existence of carrier's lien, 877.

Presumption that consignee is owner and entitled to sue, 1320.

Presumptions as to loss or injuries occurring on connecting lines, 1348, 1349.

Carriage of passengers—

Every person, not an employe, being carried with express or implied consent of carrier upon a public conveyance is presumed to be lawfully upon it as a passenger, 997.

[REFERENCES ARE TO SECTIONS.]

PRESUMPTIVE EVIDENCE—*Carriage of passengers*—con.

Presumption does not extend to private vehicles, such as to a brewer's wagon, 997, note 44.

On vehicles palpably designed for carriage of passengers, presumption exists of authority of carrier's employes to create relation of passengers, 998.

This presumption not conclusive, 998.

Presumption exists even in favor of employe of railroad company riding in passenger coach at invitation of yard-master, 998.

Persons intending to become passengers presumed to know they must enter coaches set apart for passengers, 999.

Trespassers if, without inquiry, they go upon baggage, mail or express cars, 999.

No presumption that person riding on vehicle not intended for passengers is passenger, 1000.

When failure to provide accommodations in waiting-rooms is *prima facie* evidence of negligence, 931.

Where railroad company has divided traffic, presumption is that person riding on freight train is not a passenger, 964.

How presumption may be overcome, 964.

Presumption is that those in charge of freight trains have no authority to accept passengers, 964.

Presumption may be overcome by order of superior officer of conductor, 964, note 4.

Question of negligence of passenger carrier usually one of fact, 1411.

Burden of proof on plaintiff to prove negligence, 1411.

When negligence of carrier will be presumed, 1412, 1413, 1414, 1415.

Mere proof of accident, without more, not sufficient to raise presumption of negligence, 1412.

Circumstances attending accident must be shown, 1412.

If accident connected with means or instrumentalities of transportation, a *prima facie* presumption of negligence will arise, 1413.

Negligence presumed where injury caused by breaking down or overturning of vehicle, 1414.

Or by derailment of train of cars, 1414.

Or by collision between trains, 1414.

Or by an unusual jerk or jolt, 1414.

[REFERENCES ARE TO SECTIONS.]

PRESUMPTIVE EVIDENCE—*Carriage of passengers*—con.

- Or by parting of train, 1414.
- Or by breaking down of bridge, 1414.
- Or by falling of appliances within vehicle, 1414.
- Or by obstruction placed by carrier too near track, 1414.
- Or by spark from locomotive, 1414.
- Or by block of coal thrown from engine, 1414.
- Or by explosion of locomotive boiler, 1414.
- Or by fall of gangway when carriage is by water, 1414.
- Or by bursting of a steam drum, 1414.
- Or by failure of boat's machinery to operate, 1414.
- Or by breaking of machinery, 1414.
- Or by collision of boat with bank, 1414.
- Or by overturning of stage coach, 1414.
- Or by horses attached thereto running away, 1414.
- Or by breaking of axletree of coach, 1414.
- But where injury is received by passenger while about carrier's premises, no presumption of negligence will arise, 1414.
- No presumption of negligence will arise where accident causing injury to passenger is to him and not to vehicle, 1414.
- Or where injury is caused by passenger stepping on object on station platform when alighting, 1414.
- Or where injury is caused by rock becoming detached from adjoining hillside and striking train, 1414.
- Proof of injury usually makes *prima facie* case of negligence, 1415.
- Carrier, to rebut presumption of negligence, must show that accident was inevitable, or that same could not have been avoided by exercise of utmost care and foresight, 1415.
- But where plaintiff proceeds to show just how accident happened, instead of resting on facts which would establish a *prima facie* case against carrier, his testimony must prove that accident was due to negligence, 1415.
- Presumption of negligence under statute of Georgia, 1413, note 51.
- Under statute of Nebraska, 1413, note 52.
- Presumption of negligence, held not to arise where passenger has assumed risk of all injury, 1416.

PRICE—

- Where owner has sold goods at fixed price, he cannot recover in excess, 1361.

[REFERENCES ARE TO SECTIONS.]

PRINTED FORMS—

Use of, 622.

PRISONER—

Ejection of officer with, 976.

PRIVATE CARRIER FOR HIRE—

Who is a, 35.

Distinction between liability of private and common carrier, 4.

Liable for negligence or misfeasance only, 5.

Private carrier not usually agent of owner of goods, 12.

But may be agent in cases of emergency, 13.

May protect himself by contract from all losses occasioned by negligence or misfeasance, 14, 40.

Common carriers have almost displaced private carriers for hire, 36.

Degree of diligence required, 37, 38.

Responsibility for negligence of servants, 38.

Not liable for losses by robbery or theft when proper diligence used, 39.

May enlarge his liability by contract, 40.

Contract by, to carry goods safely, not contract to insure safety of same, 40.

May by contract become liable as insurer, 40.

Contract to enlarge or limit his liability must be clear, 40.

Liability of, may be modified by usage or by previous course of dealing, 40.

Usage to have this effect must be known and established, 40.

Liable for injury to goods through his negligence, though goods subsequently destroyed without his fault, 41.

Stipulating against loss by certain causes, liable if such loss could have been prevented by proper diligence, 42.

May limit his liability to losses occasioned by his own fraud or want of good faith, 45.

Not liable to action for refusal to carry or for preferences as to whom he will serve, 45.

Cannot transform himself by contract into a common carrier, 45.

Quaere, whether he has lien on goods in respect to which he performs services, 46.

PROCESS (See LEGAL PROCESS; GARNISHMENT; TRUSTEE PROCESS)—

PRODUCTION—

Party claiming goods must produce properly indorsed bill of lading, 177.

[REFERENCES ARE TO SECTIONS.]

PRODUCTION—

If person claiming goods fails to present proper bill of lading, carrier must base refusal to deliver on that ground, 178.

Effect of provision in bill of lading requiring its production before delivery, 181.

Delivery to swindler without production of bill of lading, 671, note 19.

PROFIT—

Railroad companies are not entitled to earn the same percentage of profit on all classes of freight carried, 577.

Exorbitant rates not permissible in order to pay dividends, 581.

Carrier entitled to reasonable profits on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Courts should be fully advised of the receipts and earnings of a railroad, 584.

Effect of consolidation of several roads, 586.

Loss of profits, when compensated, 1367.

Loss of, through delay in transporting article intended for use in business, carrier not liable for, unless informed, when contract is made, of special use to which article is to be put, 1369.

PROMISSORY NOTES—

Negotiation of, does not defeat vendor's right of stoppage *in transitu*, 765.

Carrier taking note or acceptance of consignee for freight, discharges consignor, 810.

PROPELLER—

Defect in propeller held to have arisen from perils of the sea, 384, note 6.

PROSTITUTE—

Station agent calling passenger a, 1099, note 34.

PROTECTION—

Passenger, on entering vehicle, has right to claim the protection of the carrier from insults and violence of others, 980.

Law exacts from carrier prompt employment of all means at his command to protect passenger either by quelling disturbance or by expulsion of those engaged in it, 980.

Carrier liable for injury to other passengers if he fails to restrain one having *delirium tremens*, 980, note 40.

[REFERENCES ARE TO SECTIONS.]

PROTECTION—con.

Negligence for which carrier is liable is not the wrong of the fellow-passenger or stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed, 980.

Conductor merely telling persons abusing passenger to "stop that fooling" is not sufficient, 980, note 41.

Carrier liable when conductor on breaking out of trouble seeks rear part of car to "stop the train," 980, note 41.

Evidence of diligence of conductor in suppressing disorder must be diligence in suppressing disorder which arose after plaintiff became a passenger, 980, note 41.

Railway company may be liable for death of passenger caused by insane fellow-passenger, 980, note 41.

Knowledge of carrier's servants that wrong was imminent is essential in order to hold carrier liable for omission to prevent it, 980.

If passenger assaulted while conductor is attending to his duties in another part of the train and does not know of threatened assault, carrier is not liable, 980, note 42.

Liability of carrier for death of passenger on sleeping-car from shot of robber, 980, note 42.

Carrier not liable if passenger is assaulted while crew of train are gone to meal station to eat, 980, note 42.

Carrier bound to protect against assaults which might reasonably be expected under circumstances of case and condition of parties, 981.

Liability of carrier for assault on colored passenger by white passengers, 981, note 1.

Liability of carrier where conductor with fellow-passengers so intimidate passenger that he leaps from train and is injured, 981, note 1.

For conductor to keep his train in motion and busy himself in collecting fares while fight is going on falls short of his duty, 981.

Carrier must protect female passengers against general obscenity, immodest conduct or wanton approach, 982.

But carrier not liable for assaults on female passengers made under circumstances which carrier could not possibly have foreseen, 982.

Carrier not liable for accidents arising from rudeness or incivility of fellow-passengers, 983.

[REFERENCES ARE TO SECTIONS.]

PROTECTION—con.

- Not liable where passenger's arm jammed through window of car door by pell-mell rush of other passengers, 983, note 5.
- Or where female passenger is injured by male passenger pushing past her with a valise. 983, note 5.
- Or where female passenger's leg is broken through being jostled by male passenger, 983, note 5.
- Or where female passenger is injured by male passenger rudely pushing door open and striking her in face, 983, note 5.
- Duty of carrier to restrain or eject drunken passengers, 984.
- Liability of carrier where drunken passenger had assaulted another passenger than plaintiff before injury to plaintiff occurred, 984, note 6.
- Use of profane language before lady by drunken passenger after conductor failed to interfere on complaint, 984, note 6.
- Abuse of negro passenger by drunken men, 984, note 6.
- Shooting of boy by drunken passengers who had previously been shooting off dynamite sticks, 984, note 6.
- Drunken passengers compelling negro to dance at point of revolver, 984, note 6.
- Evidence of improper relations between passenger and wife of assailant not admissible on question of failure to properly protect passenger, 984, note 6.
- Carrier bound to exercise utmost vigilance in guarding against careless use of firearms, 985.
- Liability of carrier for accidental discharge of musket by disorderly soldier, 985.
- Liability of carrier where conductor retreats from scene of difficulty and passenger is shot by one of a disorderly crowd of men on train, 985.
- But duty of carrier is fulfilled when he has exercised the force at his command to prevent injury, 985.
- Carrier's duty to protect passengers from injuries by strikers, 986.
- Ordinarily not guilty of negligence in operating cars during strike of employees, 986.
- But carrier cannot invite trouble by receiving mob of hostile strikers in car who are inflamed against person already a passenger, 986.
- Ordinarily carrier cannot interfere to protect passenger from arrest, 987.

[REFERENCES ARE TO SECTIONS.]

PROTECTION—con.

Carrier's duty extends to protecting passengers against acts of violence by passengers who have been ejected or have alighted, 988.

Duty of carrier to protect passengers while in station or depot, 989.

In order to make carrier liable, latter's agent in charge of station must have known, or had opportunity to know, that injury was threatened which he could prevent or mitigate, 989.

Carrier liable if agent stands by without any attempt to prevent the wrongful act against the passenger or an intending passenger, 989.

Carrier liable if he fails to guard against long continued and notorious acts of third persons, such as scuffling by cabmen, etc., 989.

Notice to employe whose only duties are to clean up waiting room and keep up fires is insufficient, 989, note 17.

If passenger charges men with robbery, it is no breach of duty on part of carrier to start the train at the appointed time without waiting for them to be given in custody, 989, note 17.

Carrier held liable where plaintiff pelted with eggs, station agent not interfering, 989, note 18.

Carrier liable where no warning was given that persons were fighting with pistols near car steps and passenger was shot while alighting, 989, note 18.

Carrier held liable for station agent's failure to stop use of insulting language to lady in his presence, 989, note 18.

Liable for failure of station agent to restrain drunken man who flourished knife and sang vulgar songs in his presence, 989, note 18.

PROTEST—

Shipper not bound by limitations in contract of shipment if he signs under protest, 404, note 26.

PROTRUDING LIMBS—

Through window of car, whether contributory negligence, 1209, *et seq.*

PROXIMATE CAUSE—

Act of God must be proximate cause of loss to excuse carrier, 274.

To defeat recovery, plaintiff's negligence must have been proximate cause of injury, 1419.

[REFERENCES ARE TO SECTIONS.]

PROXIMATE CAUSE—con.

When carrier's negligence is proximate cause of passenger's injury, 1428, 1429, 1430.

PUBLICATION—

Of tariffs under section six of Interstate Commerce Act, 523.

Of notice of arrival in newspaper by carrier by water insufficient, 690.

PUBLIC AUTHORITY—

Carrier not liable for losses caused by, 324.

But voluntary relinquishment of vessel to government in time of war will not dissolve contracts of affreightment, 324, note 33.

Destruction or injury under police power, 325.

Loss by Confederate authority, 326.

Seizure under legal process, 327.

Effect of intervention of public authority on right to demurrage, 841, note 12.

PUBLIC ENEMY—

Carrier not liable for losses from, 314.

Words "public enemy" mean enemy of country to which carrier belongs, 314.

Losses by thieves, robbers, mobs and riots, not within exception, 315, 316.

Loss by "strikers" not within exception, 316.

Unruly soldiers not public enemies, 316.

Losses by pirates within exception, 316.

When rebellion assumes magnitude of civil war, 317.

Insurrection not war, 317.

Open declaration of war not necessary to constitute enemy relation, 318.

Existence of actual hostilities sufficient, 318.

To avail himself of this defense carrier must have been guilty of no negligence bringing about capture, 319.

Goods taken by public enemy during deviation, carrier responsible, 319.

Whether carrier may show that loss would have happened without his negligence or deviation, 320, 321.

War acts as a legal prohibition upon execution and performance of contract of carriage, 322.

Embargo does not dissolve contract of carriage, 322.

Effect of carriage of contraband goods, 323.

Delay through acceptance of enemies' goods, 653, note 22.

[REFERENCES ARE TO SECTIONS.]

PUBLIC ENEMY—con.

When vessel captured by public enemy, carrier loses freight and shipper goods, 826.

Goods recaptured and carried to destination, carrier entitled to full freight, 826.

PUBLIC NECESSITY—

Preference may be given to goods intended to relieve distress in time of public necessity, 649.

PUFF BOX—

When baggage, 1246.

PUNITORY DAMAGES—

Recovery not always limited to rule of compensation, 1435.

When carrier guilty of reckless misconduct or gross negligence, exemplary damages may be recovered, 1435.

Exemplary or punitive damages allowed to prevent recurrence of similar misconduct, 1436.

Where neglect to furnish safe tracks, vehicles, station facilities and the like is so gross as to amount to reckless disregard of passenger's safety, exemplary damages may properly be awarded, 1437.

Pecuniary ability of carrier to perform his duty, no excuse, 1437.

But to justify an award of punitive damages, action must be against wrongdoer, 1438.

Carrier not liable to punitive damages for reckless acts of servants unless shown to be a party to wrong, 1438.

Carrier only liable for such damages, therefore, where he has expressly or impliedly authorized or ratified servant's reckless act, 1438.

Retention of servant in employment, with knowledge of his unfitness, carrier liable for punitive damages where servant's reckless misconduct has occasioned injury, 1439.

The more liberal rule, 1440.

View that where act of servant is so gross as to amount to recklessness, punitive damages may be allowed, although carrier has neither authorized nor ratified servant's negligent conduct, 1440.

When punitive damages allowed for active maltreatment of passenger, 1441.

Carrier liable for punitive damages where injury to passenger caused by wilful, malicious or oppressive treatment, 1441.

[REFERENCES ARE TO SECTIONS.]

PUNITORY DAMAGES—con.

But carrier himself must have committed act, or have directed, authorized or ratified it, 1441.

Where act committed by servant, carrier not liable for punitive damages, unless servant was acting within scope of employment, 1441.

Evidence of authority or ratification, 1444.

Authority or ratification may be shown by circumstances, 1444.

Whether carrier authorized or ratified servant's reckless or oppressive act, usually a question for jury, 1444.

Retention of guilty servant in employment, after notice of his misconduct, evidence of ratification, 1444.

Promotion of guilty servant, after knowledge of his misconduct, evidence of ratification, 1444.

View that mere retention of guilty servant, after knowledge of his misconduct, no evidence of ratification, 1444.

Doctrine of *ex post facto animus*, as a basis of exemplary damages, held an anomaly, 1444.

The more liberal rule, 1442.

View that carrier is liable to punitive damages for the wilful, malicious, oppressive, insulting or fraudulent act of his servant, although he has neither authorized nor ratified it, 1442.

But to hold carrier liable for such damages, act must have been committed by servant in course of his employment, 1442.

Carrier not ordinarily liable for punitive damages where servant acted without malice and in good faith, 1443.

Carrier not ordinarily liable for exemplary damages for acts of servants unless latter would have been so liable, 1445.

Carrier may disprove wrongful intent, 1446.

But evidence to disprove wrongful intent not admissible where only compensatory damages are claimed, 1446.

Recovery of, by parent for loss of child's services, 1378.

Form of action when exemplary damages claimed in actions for death by wrongful act, 1404.

PURSER—

Whether a mariner, 469.

QUALITY—

Carrier not presumed to know quality of goods, 163.

Inability to get goods of the quality agreed to be delivered no excuse when carrier has contracted to carry in prescribed time, 625.

[REFERENCES ARE TO SECTIONS.]

QUANTITY—

Effect of recitals in bills of lading as to quantity of goods received, 164.

When bill of lading competent evidence, in action against final carrier, to show quantity of goods when delivered for transportation, 1348.

QUARANTINE—

Charterer may guard against delay by quarantine in charter party, 841.

“QUICK DISPATCH”—

Agreement for, over-rides any customary mode of doing work, 839.

Under agreement for, demurrage allowable for delay in giving security, 839.

No excuse to show that by custom of port, vessels took their turn in securing berth, 839.

RACK—

Liability of passenger carrier for injuries due to articles falling from parcel rack, 920.

RAID—

Liability of carrier without hire when raid by Confederate troops expected, 27.

RAIL—

Steel rails not required upon the roads of railway companies, because less liable to decay, 897.

Breaking of rail through frost, 948, note 49.

Liability of passenger carrier for unsound, 949.

Or broken rail, 951.

RAILINGS—

To station stairway, 940.

On gang-plank, 942.

RAILROAD BOARDS OR COMMISSIONS (See STATE REGULATION OF RATES)—

RAILROAD COMPANIES. (See COMMON CARRIER, PASSENGER CARRIER.)

As common carrier of goods—

Always common carriers as to goods, 76.

And to baggage, 93.

Not as to persons, 93.

Whether railroad company furnishing motive power and road

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods*—con.

- only, liable as common carrier for goods in car hired by owner, *quaere*, 87.
- How, when railroad company does not own cars—Circus trains, 88.
- Cannot refuse to transport coal on ground that it is of an inferior quality, 144, note 1.
- May become partners at least as to third persons, 264.
- When railroad companies will be compelled to accept goods at points on a switch, 512, note 60.
- When mandamus will lie to compel railroad company to furnish coal cars, or to haul special cars or trains, 512, notes 59 and 60.
- Whether railroad companies are bound to furnish facilities to express companies without discrimination, 514.
- Authorities in conflict on this question, 514-516.
- The "Express Cases" in the United States Supreme Court, 517.
- Giving preference to one connecting line over another, 519.
- Giving preference to one shipper over another, 520.
- Definition of "railroad" as used in Interstate Commerce Act, section one of act, 523.
- Are subject to Interstate Commerce Act under certain conditions, 524.
- Effect of joint rates in bringing a railroad within the scope of the Interstate Commerce Act, 526.
- Commission has power to establish joint rates under certain conditions, 526.
- Principal objects of act, 527.
- Express adoption of common-law, 527.
- Act must be construed broadly, 528.
- Interests of carrier, shippers and public should be considered, 529.
- Interests of public predominant on questions of reasonableness of rates, 530.
- Railroads cannot graduate charges according to prosperity of industries, 530.
- Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.
- Weight and bulk of articles should also be considered in fixing a reasonable rate, 531.
- Mileage is not the controlling factor in fixing a reasonable rate, 532.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods*—con.

On questions of reasonableness of rates, a comparison of rates is of small importance, 533.

Greater flow of traffic in one direction will justify lower rate in that direction, 533.

Summer and winter rates may vary, 534.

Second section of Interstate Commerce Act modeled on English act, 535.

Purpose of second section, 536.

Discriminative interstate contracts void under Interstate Commerce Act, 537.

Even when rates given by mistake, 537.

Discrimination must be unjust, 538.

Milling in transit agreement not necessarily discriminative, 538.

Compressing cotton in transit need not amount to unjust discrimination, 538.

Contract is governed by classification sheet in force at date of shipment, 537, note 39.

Shippers must be placed on an absolute equality, 539.

Special rebates void, 539.

A lower through rate not necessarily discriminative, 540.

Discrimination may be in passenger service, as well as property, 541.

Reasonableness of rate not necessarily involved in section two, 542.

Distinction between wholesale rates in freight and passenger traffic, 543.

Party rates, 543.

Car load usual unit in fixing freight rates, 544.

Rebate equal to cartage charges is discriminative, 545.

Payment of carrier's prior debt by carriage as discrimination, 546.

Agreement for rebate does not void contract of carriage, 547.

Effect of section two on limitations on the value of goods in bills of lading, 548.

Question of relative rates is involved in section two, 549.

Failure to pay expenses no excuse for unjust discrimination, 550.

Third section of Interstate Commerce Act modeled on English act, 551.

Section three embraces every form of unjust discrimination, 552.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods*—con.

Relative rates important under section three, 552.

Questions of undue or unreasonable prejudice or preference are questions of fact, 553.

Origin of goods immaterial under section three, 554.

Carriage of articles or commodities manufactured, mined or produced by carrier, 555.

Section three applies to carriage of timber and manufactured products thereof which are excepted by section one, 555.

Railroad cannot build up one port at expense of another by preferential rates, 555.

Discrimination in carriage of live stock and affording proper facilities under section three, 556.

Discrimination in coal car distribution under section three, 557.

Agreement between railroad company and shippers as to distribution cannot do away with obligations of section three, 557, note 21.

Effect of shipper furnishing cars, 557.

Third section applies as well to passenger as to freight traffic, 558.

Real and substantial competition justifies dissimilarity in rates under third and fourth sections of Interstate Commerce Act, 559.

Third section does not relate to acts, the result of conditions beyond control of carrier, 560.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Interests of shipper, carrier and public should be considered, 563.

Rules as to competition summarized, 564.

Condition that initial carrier shall have right to route beyond its own terminal is valid, 565.

Joint rate is not a basis for local rate, 566.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Discrimination in affording facilities for interchange of traffic, 568.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Railroad need not afford same facilities to rival as to its own branch line, 568.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods*—con.

Mere distance no criterion of "substantially similar circumstances and conditions," 568.

Company transporting partly by railroad and partly by water not obliged to allow competitor use of its wharf, 568.

Question of similarity or dissimilarity of circumstances under section four is one of fact, 569.

Real and substantial competition a factor under section four, 570.

"Basing point system" is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Joint rates under section four, 573.

Joint rate for long haul should not be less than local rate for short haul, 573.

State legislatures have power to prevent unjust and unreasonable discrimination by railroads operating within the state, 574.

State has right to pass on reasonableness of contract between connecting roads for joint action in transportation of persons or property, 574, note 8.

And has general power to fix a maximum rate, 574, note 8.

But power to regulate is not power to destroy, 574.

Legislature cannot fix maximum rate and then make exceptions to it, 574, note 9.

State regulation must not amount to taking property without due process of law, 574.

State may establish boards or commissions, 574.

But not with final and exclusive powers, 574.

Illegal excessive rates may be recovered back, 574.

Penal statutes regulating rates strictly construed, 574.

Power of a state railroad commission to establish rates, 575.

Extent of judicial interference is protection against unreasonable rates, 575.

Rates must first be fixed before courts can interfere, 575.

A state has no control over interstate rates, 576.

Reasonableness of a state rate must be determined without reference to interstate business, 577.

Railroad companies not entitled to earn the same percentage of profits on all classes of freight carried, 577.

State commission may reduce freight on a particular article, 577.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods*—con.

Burden on carrier to impeach such action of commission, 577.
Reasonableness of state rates should be determined by a study of the rates themselves, 578.

Whether actions or statements of commissioners or governor of state are material, 578.

Mileage as a factor on question of reasonableness, 579.

Comparison of rates as a criterion of reasonableness, 580.

Reasonableness of rates under Uniform Bill of Lading, 580.

A rate on a single article may be unreasonable, 581.

Exorbitant rates not permissible in order to pay dividends, 581.

Railroad entitled to reasonable profit on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Cost of replacing physical structures too narrow a basis, 583.

How far road's capitalization and bonds should be considered, 583.

Effect of sworn return for purposes of taxation, 583.

Courts should be fully advised of the receipts and earnings of a railroad, 584.

Cost of local business is greater than cost of interstate business, 585.

Effect of connecting and branch lines in determining the reasonableness of a rate, 586.

Effect of consolidation of several roads, 586.

A rate, though reasonable, should not tend to create a monopoly, 587.

Discrimination, to be actionable, must be unjust, 588.

Difference in commodity, or method of handling it, may justify different charge, 588.

A special rate is not always unjustly discriminative, 589.

A "rebilling" rate may be discriminative, 590.

An extra charge may be made for shipments received off carrier's own line, 592.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Right of carrier to recover from the shipper the difference between the discriminative and regular rate, 594.

Through rate may be less than sum of locals, 595.

Right of state to compel the issuance of mileage tickets at reduced rates, 596.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As common carrier of goods—con.*

Discrimination between localities, 597.

Whether competition is a material factor as between localities, 597.

A state may regulate domestic long and short haul rates, 598.

Shipment is an entirety in reference to long and short haul clause, 599.

Special contracts with shippers not impossibilities under long and short haul clause, 600.

Competition not a factor under Kentucky long and short haul clause, 601.

Stowage upon freight cars of railroad companies, 610.

Personal delivery to consignee not required of railway companies, 701.

Notice to consignee of arrival of goods; conflict of authority concerning, 702, *et seq.*

Rule in Massachusetts, 702.

Massachusetts rule followed in Georgia, Illinois, Indiana, Iowa, Missouri, North Carolina, Pennsylvania and South Carolina, 702.

Reasons for Massachusetts rule, 703.

New Hampshire rule as to delivery by railroads, 704.

New Hampshire rule followed in Alabama, Arkansas, Kansas, Kentucky, Louisiana, Vermont, West Virginia and Wisconsin, 704.

Both Massachusetts and New Hampshire rules require goods to be unloaded from cars with due care and deposited in a safe and suitable place, 705.

Effect of derrick being out of repair, or sidetracking goods, 705, note 36.

Massachusetts and New Hampshire rules as to delivery do not apply to delivery between connecting carriers, 706.

Cases exempting railway companies from duty of notifying consignee of arrival of goods, inconsistent with general rules of law governing delivery by carrier, 707.

No substantial reason for such exception, 707.

New York rule as to delivery requires notice if consignee is not present, 708.

New York rule followed in Michigan, Minnesota, Mississippi and Ohio, 708.

Practically the same result reached by statute in Alabama, California, Tennessee and Texas, 708.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—As common carrier of goods—con.

In Delaware, Maryland, Nebraska, Oregon and Washington uncertain which rule is followed, 708.

In New Jersey a combination of New York and New Hampshire rules prevails, 708.

Question of notice becomes immaterial when goods have, in fact, reached their destination, and railroad company, on demand, claims they have not arrived, 709.

Notice unnecessary where consignee has actual knowledge of arrival of goods, 709.

Or where address of consignee is unknown, and due diligence has been used to find him, 709.

Mode or place of delivery may be established by usage, 710.

Effect of usage on consignee's right to notice of arrival of goods, 710.

Custom not to give notice on Fourth of July valid, 710.

Bulky freight in car load lots must ordinarily be unloaded by party entitled to it, 711.

Small or package freight ordinarily unloaded by railroad company, 711.

What is reasonable time for removal of goods at end of which carrier will hold as warehouseman, 712.

When facts undisputed, reasonable time question of law, otherwise question of fact, 712.

Condition or situation of consignee no element in determining what is reasonable time, 713.

During this reasonable time liability of carrier unchanged, 714.

When it has elapsed, carrier ordinary bailee for hire, 714.

May charge storage, 714.

Liability as warehouseman continues till delivery, 714.

Must furnish reasonable facilities for getting goods, 715.

Demurrage—

Liability of consignee for detention of cars where duty to unload the goods devolves on railroad company, 858.

Where duty to unload cars devolves on consignee, if he fails to do so, railroad company may demand reasonable compensation for use of its cars, 859.

Term "demurrage," as used by railroad companies, not used in its technical sense, 859, note 20.

What rules of railroad company as to removal of goods by consignee are reasonable, 859, note 20.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*Demurrage*—con.

Distance freight must be hauled from cars should not be considered, 859, note 20.

When time fixed for consignee to unload has expired, excuses, such as weather, will not avail, 859, note 20.

Initial carrier must actually tender goods to connecting carrier, before he can charge demurrage, 859, note 20.

Acceptance of receipt by shipper containing provision for demurrage charge will create a binding contract, 860.

Shipper may be bound by reasonable rule or regulation of railroad company imposing demurrage charge, although no notice of it inserted in receipt or bill of lading, 860.

Reasonable rules and regulations of car service associations will be upheld, 861.

Such associations are not inimical to the public welfare, 861, note 3.

Lien of railroad company on goods to secure charges in the nature of demurrage, 862.

If consignee wrongfully refuses to pay such charges on a carload of lumber, the railroad company may seal the car and place it beyond consignee's control, 862, note 6.

As carriers of passengers—

Due degree of care in driving stage-coach might be recklessness in running railroad train, 898.

Liability of railroad company for latent defect in vehicle, 903-905.

For defect due to fault of manufacturers, 906-909.

Liability of railroad company for defects in bridges, 910.

For defective culverts, 910, note 19.

Railway carrier responsible if vehicle is equipped with unsafe appliances, 911.

Liability for defective seat in vehicle, 911.

For defective fastening on window, 911.

For defective doors, 911.

For misplaced coupling pins, 911.

For defective berths, 911.

For defective ladders on freight cars, 911.

For engines out of repair, 911.

For upright iron flanges on car platform, 911.

But railway carrier not bound to furnish glass doors, 911, note 22.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As carriers of passengers*—con.

Responsibilities for injuries caused by escaping sparks or cinders, 912.

When carrier liable although the immediate cause of the injury is the negligent act of a third person, 913.

Carrier liable if his own negligence concurs in any degree, 913.

Liability of carrier where injury is due to intervening cause, 914.

Duty to passenger when latter is left helpless on track through any cause, 914.

Railway company liable when injury results from defects in roads of another company over which he runs his vehicle, 915.

Same rule applies where track runs over public bridge, 915.

When railway company liable for negligent operation of sleeping-car employed by it, but owned by another company, 916.

Liability for injury caused by concurrent act of two carriers, 917.

Carriers may be sued jointly or severally, 917.

Liability of railroad company for insufficient station accommodations where station is used conjointly with another company, 917.

Liability for acts of lessee, 918.

Liability for acts of receiver, 918.

Liability for negligence of independent contractor, 919.

Liability for injury caused passenger by article brought into vehicle by another passenger, 920.

Liability for articles falling from parcel racks, 920.

Liability for baskets or valises placed in aisle, 920.

When liable for injury caused passenger by dangerous articles brought into vehicle by another passenger, 921.

Duty of railway company to supply cars with sufficient service and accommodations, 922.

Duty includes supplying adequate corps of servants, retiring places, seats, proper berths, light and heat, and drinking water, 922.

Railroad company must exercise the highest degree of care and diligence in respect of management and running of vehicles, 923.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As carriers of passengers*—con.

- Liabie if it so carelessly manages its trains that a collision occurs, 923.
- Liabie if statutory requirements as to making up train or stopping are not complied with, 923.
- When leaving wounded animal near track is negligence, 923.
- When operation of train with locomotive in the rear is negligence, 923, note 18.
- When running of a freight train between passenger train and station is negligence, 923, note 18.
- When failure to give proper signals is negligence, 923.
- When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.
- When failure to have a proper and fit telegraph line for running trains is negligence, 923, note 23.
- Carrier liable for negligence of engineer in failing to discover animal on track, 923.
- If violent storm drives freight train back on passenger track, servants of railroad company must exercise proper diligence in flagging passenger train, 923, note 24.
- Railroad company must exercise high degree of care to avoid sudden jerks or jars, 924.
- Negligence to make a running switch, 924.
- Liabie for injuries from jerks and jars resulting from use of too small an engine, 924.
- But not liable for injuries from jar caused by fellow-passenger inadvertently setting emergency brake, 924, note 27.
- Liability of railroad company where stone, attached to derrick, is swung into passing train, 925.
- Liability of railroad company where it permits gravity road to be used in connection with its track, 925, note 32.
- Duty of railroad company to keep a sharp lookout for cattle or other animals upon track, 925, note 32.
- Running train at high speed not of itself negligence, 926.
- But attending circumstances may make it negligence, 926.
- Consideration should be given to the character of the train, condition of roadbed, sharpness of curves, etc., 926.
- When carrier liable for excessive speed although passenger was standing on platform of car, 926, note 26.
- Nothing can justify carrier in running train at high speed

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As carriers of passengers*—con.

over track known to be in a dangerous condition, 926, note 26.

Making up lost time, 926, note 26.

Injury to passenger by sudden closing of door or window, when negligence, 927.

In absence of custom, carrier need not provide entrance to its cars by express or baggage cars, 927.

Carrier is under no duty to provide vestibuled trains, 927.

If vestibules are provided, carrier must see they are kept in repair, and are not needlessly left open, 927.

Not negligence to open side and floor door as train approaches station, 927, note 8.

Duty as to stational facilities, 928, *et seq.*

See STATIONAL FACILITIES.

Power of such corporations to adopt regulations as to admission into depots and stations, 943, *et seq.*

See REGULATIONS.

Duty to keep roads, vehicles, etc., in repair, 947, *et seq.*

See REPAIRS.

Responsibility for not adopting useful improvements to promote safety of passengers, 952, *et seq.*

See IMPROVEMENTS.

Duty as to examination of vehicles and other apparatus, 956, *et seq.*

See EXAMINATION; INSPECTION OF VEHICLES.

Responsibility for character of servants employed, 958, *et seq.*

See SERVANTS.

Duty to accept as passengers those who offer themselves for carriage, 962, *et seq.*

See ACCEPTANCE.

Passengers may be separated according to sex, character, etc., 972, *et seq.*

See SEPARATION OF PASSENGERS.

Ejection of passengers for misconduct, 974, *et seq.*

See EJECTION.

Duty to protect passengers, 980, *et seq.*

See PROTECTION.

Duty toward trespassers, 990.

See TRESPASSERS.

[REFERENCES ARE TO SECTIONS.]

RAILROAD COMPANIES—*As carriers of passengers*—con.

Duty toward persons rendering assistance to passengers, 991.

See ASSISTANTS OF PASSENGERS.

Duty of carrier toward passengers under disabilities, 992,
et seq.

See PASSENGER.

Who are passengers, 997, *et seq.*

See PASSENGER.

Fare and its payment, 1023, *et seq.*

See FARE.

Railroad tickets, 1028, *et seq.*

See TICKETS.

Right to provide by contract against liability for injuries to
passengers or passenger's baggage, 1069, *et seq.*

See LIMITATION OF LIABILITY BY CONTRACT.

Passenger must conform to regulations of, 1077, *et seq.*

See REGULATIONS.

Ejection of passenger for breach of regulations, 1082, *et
seq.*

See EJECTION.

Passenger must be given respectful treatment by railroad
company and its servants, 1093, *et seq.*

See SERVANTS.

Time for commencing journey and duties of company en
route, 1103, *et seq.*

See TRANSPORTATION.

Sleeping and parlor cars on railroads, 1130, *et seq.*

See Sleeping-Car Companies.

RAIN-FALL—

Whether rain-fall is act of God, 274, note 17.

RATES FOR CARRIAGE (See COMPENSATION; FREIGHT; INTER-
STATE COMMERCE ACT; PREFERENCE; DISCRIMINATION; STATE
REGULATION OF RATES)—

Must be reasonable, 521.

Must not be unjustly discriminative, 521.

Mere inequality of charges not unjust discrimination, 521.

Secret rebate unlawfully discriminative, 521.

The English rule, 522.

Text of Interstate Commerce Act, 523.

See INTERSTATE COMMERCE ACT.

Fixed by contract, not alterable by parol evidence, 804.

[REFERENCES ARE TO SECTIONS.]

RATIFICATION—

Shipper may, after acceptance of goods, by conduct amounting to a ratification, adopt the limitations in a contract of shipment, 416.

Shipper may ratify act of unauthorized agent in accepting limitation of liability, 459.

Carrier not liable where wrongful delivery of goods ratified by owner, 678.

Wrongful delivery by carrier of C. O. D. goods may be ratified, 727.

Stoppage *in transitu* by stranger without any authority cannot be ratified after goods have come into vendor's possession, 759.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Effect of ratification on servant's torts, 1444.

*Ratification of servant's acts by retaining him, 961.

RATS—

Gnawing hole in water pipe not a peril of the sea, 488.

When injury to vessel by rats is a peril of the sea, 490, note 65.

Stipulation against loss by vermin will not cover loss by rats, 492, note 70.

READ—

Failure to, no defense to limitations in contract if no fraud practiced, 408.

Failure to read, when passenger ticket mere check, 1028.

Inability of passenger to read ticket, 1052, note 36, 1054, note 43.

REASONABLENESS OF RATES—

Charges must be reasonable under Interstate Commerce Act, section one of act, 523.

Interests of public predominant on questions of reasonableness of rates, 530.

Railroad companies cannot graduate charges according to prosperity of industries, 530.

Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.

Weight and bulk of articles should also be considered, 531.

Mileage is not the controlling faction in fixing a reasonable rate, 532.

On questions of reasonableness of rates, a comparison of rates is of small importance, 533.

[REFERENCES ARE TO SECTIONS.]

REASONABLENESS OF RATES—con.

Greater flow of traffic in one direction will justify lower rate in that direction, 533.

Summer and winter rates may vary, 534.

Reasonableness of rates not necessarily involved in section two of Interstate Commerce Act, 542.

Reasonableness of a state rate must be determined without reference to interstate business, 576.

Reasonableness of state rates should be determined by a study of the rates themselves, 578.

Mileage as a factor in determining reasonableness, 579.

Comparison of rates as a criterion of reasonableness, 580.

A rate on a single article may be unreasonable, 581.

Carrier entitled to reasonable profit on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Cost of replacing physical structures too narrow a basis, 583.

How far road's capitalization and bonds should be considered, 583.

Effect of sworn return for purposes of taxation, 583.

Courts should be fully advised of the receipts and earnings of a railroad, 584.

Cost of local business is greater than cost of interstate business, 585.

Effect of connecting and branch lines in determining the reasonableness of a rate, 586.

Effect of consolidation of several roads, 586.

A rate, though reasonable, should not tend to create a monopoly, 587.

In absence of statute, agreement of parties, or controlling usage, carrier will be entitled to a reasonable compensation, 804.

REBATE—

When amounts to unlawful discrimination, 521.

Purpose of second section of Interstate Commerce Act is to forbid rebates, 536, 539.

Commissions to "transit" company illegal when used as cloak for secret rebate, 539.

Rebate equal to cartage charges is discriminative, 545.

Agreement for rebate does not void contract of carriage, 547.

REBELLION—

When persons engaged in rebellion are public enemies, 317.

[REFERENCES ARE TO SECTIONS.]

“REBILLING” RATE—

May be discriminative, 590.

RECEIPT (See BILL OF LADING)—

In general—

By carrier for goods, 154.

Bill of lading as a receipt, 157, 158, 159.

As receipt, only *prima facie* evidence, 158.

Parol evidence admissible to vary or explain bill of lading as receipt, 158.

Effect of bill of lading as receipt for quantity, quality, weight, contents, or value of goods, 159-165.

Liability of carrier when goods not received, but receipt given, 160, 161, 162.

Effect of temporary receipt, 173.

When receipt required by statute of connecting carrier, no particular form necessary, 234, note 2.

Effect of change in name on a receipt given by a careless clerk on the obligation of the carrier to deliver to the real consignees at the proper destination, 667, note 8.

Receipt as evidence of correctness of address on package, 677.

Carrier's right to demand receipt on delivery—

Carrier may demand written receipt on delivery of goods, 776.

Refusal to give receipt, good defense in action for goods, 776.

When owner desires to remove goods at different times, and separate parcels, carrier may demand receipt for all as condition precedent, 776.

“Clear” receipt does not necessarily preclude consignee from afterwards proving that the goods were in fact damaged when received from carrier, 776, note 46.

When carrier *prima facie* entitled to a receipt for entire cargo, although slight discrepancy exists in recount, 776, note 47.

Carrier cannot require surrender of bill of lading, 777.

RECEIVERS—

Of railroads, when common carriers, 77.

When railroad company liable for negligence of, 918.

RECITALS—

In bills of lading, conclusiveness of, 163-166.

Recital that rate is less than usual rate not conclusive, 475.

[REFERENCES ARE TO SECTIONS.]

RECONDITIONING CARGO OR WRAPPINGS—

Duty of master to recondition cargo, 631-633.

Lien of carrier extends to expenses necessarily incurred in reconditioning insufficient bags according to terms of bill of lading, 866, note 18.

REDUCED FARE—

What it may consist of, 574, note 8.

Effect of tickets sold in consideration of, 1028.

Abandonment of custom to sell tickets at, 1035.

REFRESHMENTS—

Passenger continues such while absent from vehicle to obtain, 1012.

Time must be allowed passenger for, 1116.

REFRIGERATING APPARATUS—

Section two of Harter Act does not forbid exemption from liability for latent defect in refrigerating apparatus, 362, note 40.

When error in management of refrigerating apparatus will be excused by Harter Act, 382, note 1.

REFRIGERATING COMPANY—

Carrier not excused because vehicles used by him are owned by a refrigerating company, 498.

REFRIGERATOR CARS—

Duty of carrier to furnish, 505.

REFUSAL—

Duty of initial carrier on refusal of succeeding carrier to receive the goods, 132.

Act of God will not excuse if carrier has wrongfully refused to deliver the goods, 313.

Consignee cannot refuse to receive goods on account of unauthorized deviation, 621.

Or of mere delay, 651.

When refusal of carrier to change destination will amount to conversion, 660, and notes.

When carrier will be protected in his refusal to deliver goods, 668.

Qualified refusal of carrier to deliver goods until identity of owner is established is not a conversion, 668.

Carrier holds as warehouseman on refusal of consignee to accept the goods, 685.

Duty of carrier by water when consignee refuses to receive the goods, 688, note 12.

[REFERENCES ARE TO SECTIONS.]

REFUSAL—con.

Consignee not bound to accept goods from carrier by water on Sunday or other legal holiday when labor forbidden, 692.

On holidays when labor not forbidden bound to accept, 692.

Unless right to refuse on such day established by custom, 693.

Labor Day, 692, note 21.

Fourth of July, 693.

Whether carrier who is bound to make a personal delivery must give notice of a refusal of the goods by consignee is a question involved in conflict of authority, 720.

Such notice has been held unnecessary, 720.

Better opinion, notice to consignor in such case is necessary, 721.

If consignee owner, notice of storing goods should be given to him, 721.

Carrier not required to give notice where consignee has done so, 721.

Where carrier holds under instructions till goods paid for, and consignee promises to pay for and take away goods within a few days, he becomes warehouseman, and is liable only as such, 722.

Carrier cannot be held liable as for conversion in failing to give notice of the refusal of the consignee to receive the goods, 721, note 21.

Duty of carrier to give notice to consignor of refusal of consignee to accept the goods only arises when personal delivery required, 725.

Consignee peremptorily refusing to accept C. O. D. goods, carrier may immediately return goods to consignor, 729.

Not compelled to return, but may notify consignor and await orders, 729.

Demurrage not allowable where master wrongfully refuses to receive all the cargo contracted for, 855.

Consignor liable for demurrage on account of delay caused by refusal of consignee to receive cargo for reasons not connected with some default of the carrier, 855.

Or from delay arising from refusal of consignee to receive cargo because damaged by an excepted peril, 855.

But consignor not liable for demurrage where refusal of consignee is due to damage through a non-excepted peril, 855.

If master refuses to deliver goods until admittedly extortionate charge for demurrage is paid, consignee may abandon goods, and recover their value, less lawful charges, 855.

[REFERENCES ARE TO SECTIONS.]

REFUSAL—con.

Carrier cannot refuse to deliver until payment of charges for a former shipment is made, 866, note 22.

If consignee refuses to receive goods under a mistake, he may sue for a refusal to deliver when a subsequent demand is made, 1317.

Consignee cannot refuse to accept injured goods, 1365.

But may, where entire value of goods destroyed, 1365.

Refusal of carrier to accept goods, measure of damages for, 1359.

Refusal by carrier to perform contract, measure of damages for, 1370.

REGALIA—

Not baggage, 1249.

REGULAR STATION—

Carrier bound to stop only at, 122.

What deemed to be, 122, and notes.

REGULATIONS—

Common carriers—

Carriage of dogs in violation of railroad company's regulations, 91.

Carrier may make reasonable regulations as to manner in which commodity will be received for transportation, 147, note 9.

Passenger carriers—

Have right to adopt reasonable regulations to exclude third persons from grounds and buildings as their business and convenience of passengers may require, 943.

Such regulations must be general and impartial, 943.

Presumption exists that their reasonable rules and regulations are for the public advantage, 943.

Railroad may regulate frequenting of depots by hotel-keepers or their servants, 943.

May exclude persons who come to sell lunch to passengers, 943.

Railway companies may adopt reasonable regulations regulating conduct of passengers themselves while in depot or on station grounds, 943.

May prohibit passengers from sleeping in waiting rooms, or lying on benches, 943.

May require white and colored passengers to occupy different rooms if accommodations are equal, 943.

[REFERENCES ARE TO SECTIONS.]

REGULATIONS—*Passenger carriers*—con.

Railway company cannot prohibit entrance of **passenger's** own carriage to station grounds to carry him or his goods to or from the train, 944.

Nor entrance of carriage of hackman, which by contract made elsewhere with passenger, has become carriage of passenger *pro hac vice*, 944.

Right of railroad company to grant exclusive right to certain favored hackmen to solicit patronage in its station or grounds in dispute, 944.

Right to grant such exclusive privilege upheld by courts of England, by the Supreme Court of the United States, and by the Supreme Courts of Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island and Virginia, 944.

Hackmen and cabmen may, however, use a public sidewalk in prosecuting their calling, if such use is not materially obstructive, 944.

Right to grant exclusive privilege to favored hackmen denied in Indiana, Kentucky, Michigan, Missouri, Mississippi, Montana, and possibly by the Supreme Court of Illinois, 945.

This view based on theory that passenger should not be exploited by creation of monopoly, 945.

But under latter view railroad company may make reasonable regulations as to where hacks or cabs shall stand, 945.

Courts divided on question whether railway company can grant exclusive access to its terminal wharf to favored steambōat line, 946.

Regulations as to smoking in stations, 928.

Railroad companies may refuse to accept persons refusing compliance with reasonable regulations, 966.

Regulation requiring purchase of ticket, or higher fare when paid on train, 1033.

Requiring exhibition of tickets to gate-keeper, 1032.

To conductor, 1036.

Requiring exchange of ticket for check, 1038.

Obedience to reasonable regulations of carrier a condition of contract to carry, 1077.

Carrier assumes responsibility of reasonableness of regulation, and liable in damages if it is unreasonable, 1077.

[REFERENCES ARE TO SECTIONS.]

REGULATIONS—*Passenger carriers*—con.

Cannot expel passenger for violation of unessential rule, 1077.

Must make known regulations to passenger before resorting to expulsion, 1077.

When facts not disputed reasonableness of regulation a question of law for the court, 1077.

Regulations that passengers shall use only one seat or half a seat, or that backs of seats shall not be turned to face each other, or that baggage shall not be placed on seats, 1077, note 17.

Rule that baggage shall not be checked until ticket procured, reasonable, 1077, note 17.

Extra charges for admittance to chair cars, 1077, note 17.

Regulation against passenger acting as express messenger, 1077, note 17.

Regulation against passengers entering coaches earlier than thirty minutes before starting, 1077, notes 17 and 18.

Regulation against passengers going past conductor while collecting fares, 1077, note 17.

Regulations excluding dogs from passenger cars or requiring their carriage in baggage cars, reasonable, 1077, note 17.

Regulations requiring extra fare for passengers with packages too large to be carried on lap, 1077, note 17.

Regulation against passenger standing on car platform, 1077, note 17.

Regulation against carrying packages of merchandise or groceries into cars, 1077, note 17.

Regulation requiring passenger to go by most direct route, 1077, note 17.

Regulation against wearing uniform cap of line of opposition steamers unreasonable, 1077, note 18.

Regulation that baggage master shall not receive baggage into baggage room until ticket procured, 1077, note 18.

Passenger not bound by regulation which contravenes the law, 1077, note 18.

Nor by void order of state board of health, 1077, note 18.

Regulation requiring payment to conductor in case of doubt of validity of ticket, void, 1077, note 18.

Carriers have undoubted right to protect themselves against wrong and imposition by reasonable regulations, 1078.

Passenger refusing to comply with essential regulation does

[REFERENCES ARE TO SECTIONS.]

REGULATIONS—*Passenger carriers*—con.

- not regain right to remain in railroad carriage by offering to conform after signal given to stop train, 1079.
- But may take passage in another train on same road, 1079.
- Regulations of carrier may be waived by usage, 1080.
- For waiver through conduct of agent or employe, latter must have been acting within scope of his authority, 1080.
- Authority of brakeman to waive regulations, 1080.
- Carrier liable if wrong person expelled for breach of regulations, 1081.
- Regulation limiting amount of free baggage, valid when reasonable, 1299, note 14.
- Regulation that baggage shall not be checked until ticket purchased is reasonable, 1281, note 25. See, also, 1077, note 17.
- Regulation that baggage shall not be received into baggage-room until ticket purchased is unreasonable, 1281, note 25. See, also, 1077, note 17.
- Regulation that baggage shall not be checked until half hour before train time, whether reasonable, will be a question for jury, 1281, note 25.
- Dogs, regulation excluding from passenger cars reasonable, 1077, note 17.
- Packages too large to be carried in lap, regulation that passengers with, shall pay extra fare, reasonable, 1077, note 17.
- Packages of merchandise, regulation that passengers with, shall not be admitted to cars, reasonable, 1077, note 17.
- Passenger inducing baggage-master to check sample case as baggage in violation of carrier's regulations, effect of, 1251.

RELATIVE RATES (see COMPARISON OF RATES).

RELEASE—

- By deceased, under Lord Campbell's Act, 1391.
- By beneficiary, 1392.
- Law governing, 1393.

REMARRIAGE—

- Of widow, not to be considered in abatement of damages in action for death by wrongful act, 1397, note 28.

REMEDY—

- Matters relating to remedy are governed by law of forum, 208.

[REFERENCES ARE TO SECTIONS.]

REPAIRS—

Common carriers—

- Vessel should be cleaned and repaired often and well, 379.
- Proof of inspection of a general character only is insufficient, 380.
- Possession of surveyor's certificates of not great importance in proving due diligence to make vessel seaworthy, 380.
- When error of judgment of master as to amount of repairs necessary is fault in "management of vessel," 382, note 1.
- A failure of the master to put in for repairs is a fault in the "navigation of the vessel," 383, note 5.
- Duty of carrier of live stock to keep pens in repair, 510.
- Delay through necessity of repairs, 654.
- When inability to make necessary repairs to vessel will justify sale of goods, 788.

Passenger carriers—

- Must use same care in keeping road in order as in selecting vehicle, 947.
- Especially is this so in regard to railroads, 947.
- Highest degree of care required in construction of road-beds, 947.
- But need not be so expensive as to make business of carrier impracticable, 947.
- Not liable for defect in road-bed caused by extraordinary and unforeseen event, when due diligence used, 947.
- Not required to provide against unprecedented storms and floods, which cannot reasonably be foreseen, 948.
- Not liable for breaking of rail by sudden action of frost and great variation in temperature, 948, note 49.
- Not liable for accidents due to snow slides in regions where they had never occurred before, 948, note 49.
- Nor for giving way of an embankment due to an unprecedented rain, 948, note 49.
- But railroad company is liable for accidents due to excavations in right of way, 948, note 49.
- Or for damage from floods in locality noted for heavy rains and floods, 948, note 49.
- When unsound materials used in subsidiary appointments, carrier liable, 949.
- Liable for unsound rails, defective switches, etc., 949.
- Liable for rotten ties, 949, note 52.

[REFERENCES ARE TO SECTIONS.]

REPAIRS—*Passenger carriers*—con.

Not enough that track is in “apparently” good condition, 949, note 52.

When evidence is admissible of condition of track in the immediate vicinity, 949, note 52.

Not liable for accident caused solely by negligence or trespass of stranger, 950.

Carrier will be liable for act of stranger when done at request of carrier’s servant or with his acquiescence, 950.

Accident from latent defect, when carrier liable for, 951.

Liability for not discovering in time openly existing defect in track, 951.

Liability for breaking of car wheel, 951, note 3.

Liability for broken rail, 951.

If old cars used, they must be kept in good repair, 952, note 6.

REPLEVIN—

Mere delay will not sustain action of replevin unless demand for return of goods made, 651.

When owner may maintain replevin although goods are shipped in care of a third person, 676.

When consignee should be given notice by carrier of replevin suit by shipper, 743, note 23.

When goods procured by consignee from carrier by trick or fraud, carrier may retake possession by writ of replevin, 871.

RES GESTAE—

Statement of mandatary who has been robbed, immediately after robbery, competent in his favor, 33.

Statement of mandatary at time of demand and refusal, part of *res gestae*, 33.

RESISTANCE—

Right of passenger to resist ejection, 1089, 1090.

Damages for injuries received in, 1090.

RESPONSIBILITY OF CARRIERS (see CARRIER WITHOUT HIRE; PRIVATE CARRIER FOR HIRE; COMMON CARRIER; PASSENGER CARRIER).

RESTIVENESS—

Carrier does not warrant against consequences of restiveness of animal, 336, 337, 338.

[REFERENCES ARE TO SECTIONS.]

RETIRING PLACE—

Duty to supply vehicles with, 922, and notes.

Not required on caboose, 922.

Duty of carrier to provide in stations, 931.

RETURN OF GOODS—

Consignee's right to return damaged goods, 734.

REVOLUTION (see REBELLION; WAR).

REVOLVER—

When baggage, 1246.

RIFLE—

When baggage, 1246, note 26.

RIGHTS OF CARRIER—

To action for injury to or loss of goods, 779-782.

Carrier's right to insure the goods or to have shipper procure insurance for carrier's benefit, 783-784.

To sell the goods, 785-793.

To give away goods, 794.

To know character of goods and contents of package, 795-798.

To compensation, 799, *et seq.*

(See COMPENSATION.)

To freight *pro rata itineris*, 814, *et seq.*

To demurrage or damages in the nature of demurrage, 832, *et seq.*

See DEMURRAGE.

To a lien, 864, *et seq.*

See LIEN.

RING—

When baggage, 1246, note 26.

Not negligence in passenger to place in pocket-book while asleep in sleeping-car, 1132, note 3.

RIOTERS—

Not "public enemies," 316.

RICTS—

Will excuse delay, when, 657.

RIVAL—

Railroad is under no obligation to build up rival's business at expense of its own, 568.

Company transporting partly by railroad and partly by water not obliged to allow rival use of its wharf, 568.

[REFERENCES ARE TO SECTIONS.]

RIVER BANK—

Mere deposit of goods by carrier by water on river bank without notice to consignee may be sufficient if valid usage exists, 696, note 31.

RIVET—

Liability of vessel for latent defect in rivet, 364, note 46.

Unseaworthiness may consist of defect in rivets on tanks or boilers, 372.

When damage through water coming in rivet hole may be deemed to be due to "management" of vessel, 382, note 1.

ROADS—

Must use same care in keeping road in order as in selecting vehicle, 947.

Especially is this so in regard to railroads, 947.

Highest degree of care required in construction of road-beds, 947.

But need not be so expensive as to make business of carrier impracticable, 947.

Not liable for defect in road-bed caused by extraordinary and unforeseen event, when due diligence used, 947.

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Or for damage from floods in locality noted for heavy rains and floods, 948, note 49.

When unsound materials used in subsidiary appointments, carrier liable, 949.

Liable for unsound rails, defective switches, etc., 949.

Liable for rotten ties, 949, note 52.

Not enough that track is in "apparently" good condition, 949, note 52.

When evidence is admissible of condition of track in the immediate vicinity, 949, note 52.

Not liable for accident caused solely by negligence or trespass of stranger, 950.

[REFERENCES ARE TO SECTIONS.]

ROADS—con.

Carrier will be liable for act of stranger when done at request of carrier's servant or with his acquiescence, 950.

Accident from latent defect, when carrier liable for, 951.

Liability for not discovering in time openly existing defect in track, 951.

Liability for broken rail, 951.

ROBBERS—

Carrier without hire not liable for loss from robbers, provided ordinary prudence used, 23, 24, 25, 26, 27.

Liability of private carrier for hire for loss by robbers, 39.

Common carrier may stipulate for exemption from liability for loss caused by robbers, 422.

Who are within contract excluding liability for, 467.

Robbery, other than by pirates, not a peril of the sea, 491.

Carrier as warehouseman not liable for loss by robbers without his fault or negligence, 685.

Liability of passenger carrier for death of passenger on sleeping car from shot of robber, 980, note 42.

ROCK—

Whether obstruction due to hidden rock, not before known to navigators, is act of God, 270.

ROLLING OF VESSEL—

In cross sea not a peril of the sea, 488, note 56.

ROPE—

When breaking of rope a peril of the sea, 487, 490, note 65.

ROUND TRIP TICKET—

Person holding, who comes to station with return coupon for purpose of making return journey is a passenger, 1006, note 38.

Must be used according to conditions, 1054.

Effect of parts being detached by accident, 1055.

By mistake of conductor, 1059, 1065, note 29.

ROUTE—

When initial carrier may select route beyond his own line, 130.

Carrier must go by less dangerous route, 294.

Condition that initial carrier shall have right to route beyond its own terminal is valid under Interstate Commerce Act, 565.

Carrier's duty to transport by usual direct route, 613.

If two routes usual, may select, 613.

Departure, in accordance with general and well established usage, will not render carrier liable, 613.

[REFERENCES ARE TO SECTIONS.]

ROUTE—con.

- Absence of special instructions gives carrier choice as to route, 613, note 53.
- If one of such routes has become unsafe from accidental or temporary cause, must transport by the other, 614.
- Shipper must be notified before carrying by dangerous or unsafe route, 614.
- Option as to routes must be exercised with regard to shipper's interest, 615.
- Tempestuous weather may render deviation necessary, 616.
- If goods carried over wrong route, by fault of shipper or his agent, final carrier is entitled to his lien, 867.
- Driver of coach must select least dangerous route, 959.
- When longer and shorter route, and route not designated in ticket, passenger should take shorter route, 1051.
- But usage to take longer route is valid, 1051.
- Regulation requiring passenger to go by most direct route, 1077, note 17.

RUDENESS—

- Carrier not liable for accidents arising from rudeness or incivility of fellow-passengers, 983.
- Not liable where passenger's arm jammed through window of car door by pell-mell rush of other passengers, 983, note 5.
- Or where female passenger is injured by male passenger pushing past her with a valise, 983, note 5.
- Or where female passenger's leg is broken through being jostled by male passenger, 983, note 5.
- Or where female passenger is injured by male passenger rudely pushing door open and striking her in face, 983, note 5.

RULES (see REGULATIONS)—

- What rules of railroad company as to removal of goods by consignee are reasonable, 859, note 20.
- Shipper may be bound by reasonable rule or regulation of railroad company imposing demurrage charge, although no notice of it inserted in receipt or bill of lading, 860.
- Reasonable rules and regulations of car service associations will be upheld, 861.

RUNNING SWITCH—

- Passenger carrier liable for injuries resulting from making a, 924.
- Common carrier liable for making a running switch with cars containing live stock, 639.

[REFERENCES ARE TO SECTIONS.]

SAFETY OF GOODS—

Goods must be carried according to directions of shipper if their safety requires it, 611.

But, likewise, emergency may justify deviation from instructions when safety of goods requires it, 612.

SAIL BOAT (see VESSEL)—

Contracting to carry by sail boat, carrier liable if he sends by steamboat, 619.

So contract to send by steamboat not complied with by sending by sail boat, 618, 619.

ST. VITUS DANCE—

When mistaken by carrier for drunkenness, 969, note 21.

SALE—

Bailment to carrier confers no authority to sell, 785.

Sale by, without other authority, passes no title even to innocent purchaser for full value, 785.

Lien for freight confers no power to sell to satisfy charges and expenses, 786.

When goods stored for charges by carrier with another warehouseman, latter holds for carrier, not for owner, 786.

And goods are then subject to lien of warehouseman as well as to that of carrier, 786.

Extraordinary emergency confers extraordinary power on carrier, 787.

Should sell goods when necessities of case demand, 787.

In such case, sale binding on all parties, 787.

Sale of perishable goods by carrier, 787.

Master of vessel may sell cargo, when, 788.

When inability to make necessary repairs to vessel will justify sale of goods, 788.

Master not absolutely bound to transship, 789.

To establish title purchaser must show necessity of sale, 790.

Whether necessary conditions existed to justify sale a question for the jury, 790.

Sale without necessity a conversion, 790.

Owner of vessel responsible for unjustifiable sale, 791.

Degree of necessity justifying such sale, 792.

Should communicate with owner of goods before sale when practicable, 792.

Sale must be where there is a market and competition, 793.

[REFERENCES ARE TO SECTIONS.]

SALE—con.

When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.

Sale without authority, carrier not entitled to compensation, 817.

Not entitled to compensation, if sale through unfitness of vessel to carry goods further, 817.

Or under erroneous decree of court, subsequently reversed, 817.

Or by person assuming to act for owner, but without authority, 817.

Sale by carrier, without authority, to enforce lien is a conversion, 889.

If statute exists, sale must be conducted in accordance with, and upon notice provided by statute, 889.

Goods not intended for sale, measure of damages for loss of, actual value to owner at time of loss, 1363.

SALT—

If usage to carry salt as part of cargo of general ship, not negligence to take it on board with other goods, 606.

SATCHEL—

Negligently left by passenger near open window of sleeping-car, liability of company for loss of, 1132, note 8.

SATISFACTION—

In action by carrier against third persons satisfaction of judgment for full value passes title to property to party against whom recovery is had, 780.

SAVINGS—

Of deceased not to be considered in abatement of damages in actions for death by wrongful act, 1397, note 28.

SAVINGS BANK—

When baggage, 1246.

SCUFFLING—

Duty of carrier to guard against, in station by cabmen, 989.

SEAMEN—

Desertion of, not a peril of the sea, 490, note 65.

SEAT—

Liability of passenger carrier for defective seat in vehicle, 911.

Duty to supply seats in a day coach, 922.

Regulations that passengers shall use only one seat or half a seat, or that backs of seats shall not be turned to face each other, or that baggage shall not be placed on seats, 1077, note 17.

[REFERENCES ARE TO SECTIONS.]

SEAT—con.

- Right of passenger to, before surrendering ticket, 1113.
- Passenger unable to obtain, within car, cases holding he will be justified in riding upon platform, 1198.
- Better rule is that if there is standing room within car, passenger should avail himself of it, 1198.
- But passenger not required to push or crowd his way, 1198.
- Passenger may leave, for any reasonable purpose, 1216, note 1.
- In caboose, passenger sitting on arm of, chargeable with contributory negligence, 1217.
- When seats in caboose full, passenger not chargeable with contributory negligence in standing up, 1217, note 14.

SEAWORTHINESS—

- Act of God no excuse if carrier's vessel unseaworthy, 293.
- Effect of sections two and three of the Harter Act on the warranty of seaworthiness, 363.
- Liability of carrier for latent defects, 364.
- The test of seaworthiness, 366.
- Vessel must have special appliances for perishable cargo, 366.
- Warranty of seaworthiness does not imply a warranty of insurability at usual rates, 366, note 49.
- Burden of proof on carrier under Harter Act to prove vessel seaworthy or due diligence was used to make her seaworthy, 367.
- Finding that ship is unseaworthy ought not, however, be based on doubtful inferences, 367.
- Warranty of seaworthiness extends to time vessel actually breaks ground for the voyage, 368.
- Vessel must be seaworthy at each stage of the voyage, 368.
- Vessel liable for damages due to initial instability, 369.
- No usage can validate navigation by unstable ships, 369.
- Vessel unable to withstand swells of passing vessel presumed to be unseaworthy, 369.
- Steamer capsizing soon after leaving port presumed unseaworthy, 369.
- Presumption of unseaworthiness when leaks soon happen in ordinary weather, 370.
- No presumption of unseaworthiness because decks or hatches leak after a continuous gale, 371.
- But improperly caulked decks or hatches may make vessel unseaworthy, 371.
- Unseaworthiness may consist of defects in rivets or bolts, 372.

[REFERENCES ARE TO SECTIONS.]

SEAWORTHINESS—con.

But parting of one rivet among thousands not sufficient to raise presumption of unseaworthiness, 372.

Whether an unfastened port on sailing renders a vessel unseaworthy, 373.

Defects in water and steam pipes may make vessel unseaworthy, 374.

Bulkheads ordinarily need not be water-tight, 375.

Vessel may be unseaworthy through insufficiency of coal to complete the voyage, 376.

Defective fog horns, effect of, 377.

Slight deviation in compass will not make vessel unseaworthy, 378.

Vessel should be cleaned and repaired often and well, 379.

What is due diligence in making vessel seaworthy, 380.

Possession of surveyor's certificate of not great importance, 380.

Clauses in bills of lading exempting owner of vessel from providing seaworthy vessel strictly construed, 464.

A vessel may be unseaworthy as to a passenger's baggage, 497, note 11.

Carrier must provide seaworthy vessel, 497.

SECOND-HAND GOODS—

Measure of damages for loss of, 1363.

SECURITY—

Carrier protected in refusal to deliver to unidentified consignee even though security offered, 668, note 13.

Under agreement for quick despatch, demurrage allowable for delay in giving security, 839.

Carrier may demand security for entire freight before delivering any portion of goods, 870.

Consignee refusing, carrier may store at his expense, 870.

SEPARATION OF GOODS—

Goods must be separated by carrier by water so as to afford consignee an opportunity for inspection and removal, 691.

SEPARATION OF PASSENGERS—

Providing separate rooms in station for colored passengers, 943.

Passengers may be separated into different classes according to the fare which may be charged, 972.

May interdict intrusions by one class on accommodations prepared for others, 972.

[REFERENCES ARE TO SECTIONS.]

SEPARATION OF PASSENGERS—con.

Separations on account of color, 972.

Constitutionality of state statutes requiring separate accommodations for white and colored passengers, 972, note 28.

May enforce separation of male and female passengers, 972.

Effect of male passenger entering ladies' car without objection, 972, note 29.

Contracts for carriage understood as made with reference to such regulations as to separation, 973.

SERVANT (see AGENT; STATION AGENT)—

Responsibility of Private Carrier for hire for negligence of servants, 38.

Limitation against negligence of carrier's servants will not extend to personal negligence of carrier, 467, note 2.

Passenger carrier not liable where his servant accidentally falls against carrier, 900, note 25.

Duty of passenger carrier to provide adequate corps of servants for his vehicle, 922.

Servants must be competent, attentive and skilful, 958.

Driver of coach on dangerous route must be cool, self-possessed and prudent, 958.

Carrier liable for negligence or incompetency of, 959.

Driver of coach must select least dangerous route, 959.

Must caution passengers in passing over dangerous part of route, 959.

Liable for accident from racing or improper speed, 959.

When passenger has been put in dangerous position by negligence of driver and injures himself in attempting to escape, carrier liable, 959.

Or where accident occurs through intoxication of driver, 959.

Liability of railroad for injury to passenger due to brakeman wantonly calling, "Jump for your lives," 959, note 30.

Corporations organized for carrying, responsible for negligence or incompetency of servants, 960.

Constructively present when servant acting within scope of authority, 960.

Carrier by steam held to strictest accountability for competency and skill of servants, 960.

But shipowner not liable for failure of master to deliver telegram gratuitously to passenger, 960, note 32.

Carrier liable when employe, acting in line of his duty, pushes or

[REFERENCES ARE TO SECTIONS.]

SERVANT—con.

- crowds a passenger about to alight, and an injury ensues, 960, note 33.
- Gross misconduct knowingly to employ incompetent or intemperate servant, 961.
- In such case, liable for vindictive damages to passenger injured thereby, 961.
- Presumption that accident was caused by his intemperance in such case, where injury occurs which might have been avoided by skill, 961.
- Intemperate habits of railway employe with knowledge of company may be shown in aggravation of damages, 961.
- Retention of, ratifies act, 961.
- Passenger has right to claim absolute protection against assaults and violence of carrier's servants, 1093.
- When assault by carrier's servant occurs on carrier's vehicle, carrier liable even though servant has seemingly departed from line of his duty, 1093.
- Rule true in respect of carriers by water as in respect of carriers by land, 1093.
- Liability of steamboat company for handcuffing passenger and subsequent ejection, 1093, note 13.
- Liability of steamboat company for quarrelsome, violent and fighting crew, 1093, note 13.
- Liability of railroad company for assaults on passengers by conductors, 1094.
- For opprobrious and abusive language by conductor, 1094, note 15.
- For conductor shooting boy in leg, 1094, note 15.
- Liability of railroad company for assaults by brakeman, 1094.
- Railroad company liable for assaults on passenger by porter of sleeping or drawing-room car, 1095.
- Owner of omnibus liable for assault on passenger by omnibus guard, 1095.
- Liability of carrier by water for assaults on passenger by clerk, steward, or mate of boat, 1096.
- Exemplary damages allowed in such cases, 1097.
- Early overruled cases in New York hold carrier not liable for assault by servant not acting in line of his duty, 1098.
- Liability of carrier for assault by servants in station or before or after the existence of the relation of carrier and passenger, 1099.

[REFERENCES ARE TO SECTIONS.]

SERVANT—con.

In such cases carrier only liable for torts by servant in course of servant's duty, but not for acts of wilful misconduct, 1099. Assault on female passenger by negress employed in depot, 1093, note 12.

Railroad liable where station agent kicked man down stairs under impression he was drunk, 1099, note 32.

Liability of railroad company where station agent, after altercation, shoots passenger in thigh, 1099, note 33.

Liability of railroad company where person shot by baggage master during altercation, 1099, note 33.

Liability of railroad company for peace officer in station striking passenger with billy, 1099, note 34.

Liability of railroad company operating a union depot for assault on passenger by gate keeper, 1099, note 34.

Liability of railroad company for act of station agent in charging passenger with passing counterfeit money, calling her a prostitute and detaining her, 1099, note 34.

Liability of railroad company for injuries to passenger while servant ejecting a drunken man from station, 1099, note 34.

Liability of railroad company for injuries to passenger during friendly scuffle of carrier's servants on platform, 1099, note 34.

Liability of railroad company where passenger contracts smallpox from ticket agent, 1099, note 34.

Liability of railroad company for assault on passenger before leaving premises, 1099, note 34.

Liability of railroad company for assault on passenger by section boss, 1099, note 34.

Liability of carrier for wrongful arrest of passenger by carrier's servants, 1100.

Carrier liable for indecent assaults by his servants on female passengers, 1101.

Liable for assaults by conductor, porter, station agent or baggage master, 1101, and notes.

Effect of passenger provoking assault by immodest or improper remark, 1101.

Decent behavior on part of passenger also required, 1102.

If passenger assaults carrier's servant, latter has right to defend himself, 1102.

But words of provocation by passenger no excuse for assault by carrier's servant, 1102.

[REFERENCES ARE TO SECTIONS.]

SERVANT—con.

But proof of passenger's insulting language or violent conduct may be shown in mitigation of damages, 1102.

Recovery by master for loss of services of servant, 1376.

SERVANT'S LIVERY—

When baggage, 1246.

SET-OFF—

Party liable for freight may set off damages, 799.

SEX—

Separation of passengers for, 972.

SHERIFF—

Delivery of goods at vendee's store at the time in possession of sheriff does not defeat vendor's right of stoppage *in transitu*, 769.

SHIFTING—

Goods should be secured from possibility of shifting, 358.

When fact that cargo got "adrift" is insufficient to show improper stowage, 602, note 18.

SHIPOWNER—

Common carrier, when, 74.

Not when vessel hired under charter party, 85.

Even though time for loading or unloading is definitely fixed, charterer or consignee not liable for delay caused by the default of shipowner, 834.

Or for delay due to insufficient number of men being hired by shipowner for his part of work, 834.

Ship cannot claim demurrage for delay caused by observance of stipulation inserted for shipowner's benefit, 835.

Where stipulation that vessel shall be loaded only when she can be kept afloat time lost in waiting for necessary tides and depth is lost to shipowner, 835.

Burden of proof on shipowner to prove charterer did not use due diligence in loading or unloading, 842.

Rights and duties of shipowner and charterer are reciprocal, 844.

Where only one set of apparatus for unloading available, a usage of the port controlling that apparatus will be binding on shipowner, 846.

Shipowner liable for delay in bringing vessel to berth given her, 848.

Shipowner not entitled to demurrage where delay is due to his own default or that of master of vessel, 855.

[REFERENCES ARE TO SECTIONS.]

SHIPOWNER—con.

Waivers of claim for demurrage by shipowner, 857.

Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

SHIPPER—

Should disclose real value and character of goods, 328-332, 433.

Should not intermeddle with goods in transit, 333.

Should disclose peculiarities of live stock affecting risk, 343.

Duty as to packing goods, see PACKING.

Shipper should object to terms of bill of lading when tendered to him, 404, note 27.

Not bound by limitations if he signs under protest, 404, note 26.

Must give carrier reasonable notice when car necessary for his exclusive use, 495, note 6.

Duty of shipper when he undertakes to ice cars, 505.

Selection of vehicle by shipper, effect of, 508.

Effect of shipper's knowledge of negligent stowage, 602, note 18.

Shipper must not be in default on contract of carrier to carry in prescribed time, 628.

Shipper may assume duty by contract to care for live stock while in transit, 640.

Failure of shipper of live stock to furnish caretaker does not excuse subsequent negligence of carrier, 642.

If shipper voluntarily undertakes to load or unload live stock, he cannot recover for effect of his own negligence, 643.

When goods dangerous in transportation, duty of shipper to make known such fact, 796.

Liability of shipper of dangerous goods, 798.

SHIPPING (SEE CARRIER BY WATER; COMMON CARRIER; DEMURRAGE; HARTER ACT; SEAWORTHINESS; SHIPOWNER; VESSEL).

SHIPPING DIRECTIONS (see DIRECTIONS)—

Duty of initial carrier to forward shipping directions to connecting carriers, 130, 140.

SHOW CAR—

Riding in, when will be contributory negligence, 1201.

SHRINKAGE—

Effect of shrinkage of goods upon carrier's right to freight, 813.

SICK ANIMALS—

Care due sick animals, 636.

[REFERENCES ARE TO SECTIONS.]

SICKNESS—

- Produced by conditions within car, not contributory negligence for passenger to go upon platform while car in motion, 1198, note 42, 1199.
- Passenger wrongfully put off train, sickness caused by, held too remote to be considered an element of damage, 1428.
- This rule followed where action was for tort as well as where action was for breach of contract, 1428.
- Failure of train to stop to take on passenger whereby passenger undertakes to walk to destination, sickness caused by, too remote to be considered an element of damage, 1428.
- Rule that where breach of contract to carry in itself amounts to a tort, carrier must respond, whether action be for breach of contract or for tort, if passenger receive injury while seeking to extricate himself from place where carrier has wrongfully placed him, 1429.
- But passenger must have exercised reasonable care and prudence for his own safety, 1429.
- This rule followed by most of states of this country, 1429.
- Under this rule damages for sickness, caused by being wrongfully put off train, may be recovered, 1429.
- Or by being unjustifiably detained and exposed to unhealthy climate, 1429.
- Or by being compelled to walk back to destination after having been negligently carried beyond it, 1429.
- Or by leaving passenger exposed all night to weather after failure to stop at advertised landing place, 1429.
- Or by being compelled, on account of station being closed, to wait upon platform for delayed train, 1429.
- Or by being obliged to wait for a delayed train in station not heated, 1429.
- But where passenger has forfeited his right to ride, compensation for suffering caused by exposure, not recoverable, 1429, note 42.
- Effect of previous sickness or disease, on damages recoverable, 1432.
- Carrier liable to full extent of injury as affected by such previous sickness or disease, 1432.
- Ignorance of carrier of previous sickness or disease, no excuse, 1432.
- Fact that passenger wears artificial limb which aggravates injury, no excuse to carrier, 1432.

[REFERENCES ARE TO SECTIONS.]

SICKNESS—con.

Fact that female passenger who is pregnant would not have been injured had she not been pregnant no excuse to carrier, 1432.

Although disease is immediate cause of death, if death be hastened by injury due to carrier's negligence, carrier will be liable, 1432.

Where disease, caused by injury, supervenes, carrier will be liable for full compensatory damages, 1432.

SICK PASSENGERS—

Carrier not required to accept sick, aged or disabled passengers, 992.

Such persons should provide themselves with the assistance needed, 992, note 27.

But if accepted, carrier bound to exercise a degree of care commensurate with the responsibility assumed, 992.

Passenger who is taken sick on journey cannot be put off the vehicle and left unprotected, 992.

Reasonable care must be used in temporarily providing for his safety, 992.

Persons desiring immunities or amenities because of sickness should make their sickness known, 992, note 27.

Carrier bound to provide assistants of sick passengers a reasonable time to leave the train, 992, note 27.

Carrier liable for injuries to sick persons by carelessness of conductor in assisting them to alight from vehicle, 992, note 27.

Ejection of sick passenger from caboose between stations because of regulation of carrier against carrying passengers on freight trains, 992, note 28.

Treatment of sick passenger by gateman, 992, note 28.

Ejection of passenger stricken with paralysis, 992, note 30.

Death of sick passenger through exposure to the elements, 992, note 30.

Ejection of sick passengers, 1083.

Duty of carrier by water to, 1163.

SIDE TRACK (See SPUR TRACK)—

What constitutes a delivery to carrier where cars are loaded on side track, 125.

Delivery not complete by railroad when cars containing goods are sidetracked in its yards, 705, note 34.

Failure to secure freight car properly on side track as evidence of negligence against passenger carrier, 923.

[REFERENCES ARE TO SECTIONS.]

SIDETRACKING CATTLE—

Carrier liable for unreasonable delay through, 652, note 20.

SIDEWALK—

Adjoining station, passenger carrier's duty as to, 937.

SIGNAL—

Effect of signal to carrier to stop, 1005.

When failure of servants of passenger train to give proper signals is negligence, 923.

SIGNAL LIGHTS—

When mistake of master as to signal lights is a peril of the sea, 484.

SIGNATURE—

Effect of omission of carrier's signature on bill of lading, 412.

Statutory requirements as to signatures on bill of lading, 412.

SILENCE—

Of shipper touching character and value of goods, effect of, 330, note 3; 332; 433; 434.

Duty of shipper to disclose peculiarities affecting risk as to live animals, 343.

SILVERWARE—

Sending silverware in basket without disclosing value to carrier, 332.

Not baggage, 1249.

SKIDS—

Leaving skids on station platform in dangerous position, 935.

SKIRTS—

Injuries to female passengers through skirts catching on car appliances, 911, and notes.

SLATS—

When carrier of live stock liable for defective slats, 509, note 46.

SLAVES—

Laws applicable to common carriers do not apply to carriage of, 891.

Carrier liable for want of care in transportation, 891.

SLEDS—

Proprietors of, are common carriers when, 68, 70.

Liability of owners of sleds for loss of goods, 53, note 10.

[REFERENCES ARE TO SECTIONS.]

SLEEPING-CAR—

Passenger carrier liable for negligent operation of sleeping-car employed by it but owned by another company, 916.

Duty to supply proper berths in a sleeping-car, 922.

Examination of, by railroad company, 957.

SLEEPING-CAR COMPANIES—

Sleeping-car companies not common carriers or innkeepers, but bound for reasonable care, 1130.

Rule under Interstate Commerce Act, page 574.

Negligence the test of liability, 1131.

Mere fact of loss of baggage does not raise any presumption of negligence, 1131. *

But burden of proof on company to show it exercised reasonable care while passenger was asleep in protecting his property from theft, 1131.

Same degree of care not necessary when passenger is 'awake as when asleep, 1131, note 3.

Degree of care required when passenger sleeps in smoking compartment by permission of porter, 1131, note 3.

Obligation of company includes supplying car with sufficient servants of suitable capacity and experience, 1131.

Carrier liable when passenger's effects purloined by servants themselves, 1131.

Negligence in company to give porter such duties he cannot keep aisle continuously in view, 1131, note 4.

But, even when negligent, sleeping-car company liable only for such reasonable baggage as passenger needs upon journey, 1132.

Company not liable for loss of pistol, 1132, note 7.

When liable for loss of mileage book, opera glasses, glass and brass compass, razor and strop, 1132, note 7.

Liability of sleeping-car company for loss of money carried by passenger, 1132, notes 8 and 9.

Liability for loss of satchel, 1132, note 8, 1133, note 11.

Liability for loss of diamond ring, 1132, note 8.

Liability for loss of umbrella, 1132, note 9.

Company ordinarily not liable for loss of property under control of passenger, 1132.

Limitations of company's liability rest upon same rule as in case of passenger carriers generally, 1132.

Care due by company when passenger away from berth, 1133.

[REFERENCES ARE TO SECTIONS.]

SLEEPING-CAR COMPANIES—con.

Rules applicable to sleeping-car company apply also to parlor car company, 1134.

Railroad company liable as common carrier for loss of passenger's goods on sleeping-car, 1135.

As between passenger and railroad company, servants of sleeping-car company are servants of railroad company, 1135.

Railroad company entitled to determine who shall occupy sleeping-cars, 1136.

Sleeping-car company not responsible for train connections, 1137.

When sleeping-car company liable for failure of sleeping-car to go over the same line of railroad that passenger's ticket calls for, 1138.

Duty of sleeping-car company to furnish berth, 1139.

Right of passenger to berth subject to reasonable rules and regulations of company, 1139.

Duty of sleeping-car company to furnish means for getting into or out of berth, 1140.

Passenger entitled to occupy only the berth he pays for, 1141.

Duty of servants of sleeping-car company to awaken passengers in time to alight, 1141.

Duty of sleeping-car company to ventilate and heat cars, 1143.

Duty of company to keep aisles clear from obstruction, such as valises, 1144.

Liability of sleeping-car company for assaults by its servants on passengers or for wrongful expulsion, 1145.

Liability for miscarriage of married women due to expulsion, 1145.

Liability of sleeping-car company for baggage in custody of porter while lady passenger is leaving train, 1146.

Baggage retained by passenger on sleeping-car, carrier liable as insurer of, 1266.

SLEEPING PASSENGER—

Duty to awaken, 1128, 1142.

Announcement of station when passenger asleep, 1121.

Prohibiting passengers from sleeping in waiting-rooms, 943.

Failure to leave train immediately on account of being asleep does not terminate passengership relation, 1016.

SLOOP—

Owner of, as common carrier, 56, 85.

SLOPE—

Of station platform toward track, 933.

[REFERENCES ARE TO SECTIONS.]

SLUICE GATE—

When an omission to open sluice gate is a fault in the "management" of a vessel, 382, note 1.

SMALLPOX—

Passenger contracting, from station agent, 1099, note 34.

SMOKING—

Regulations as to, in stations, 928.

SMOTHERING—

Carrier liable if he smothers hog by placing it in steam-heated car, 634, note 36.

SNAG—

Vessel striking upon, whether act of God, 270.

See ACT OF GOD.

SNOW—

Delay through snow rendering road impassable, 654.

Snow on station platform, 935.

On stairways of station, 937, note 33.

On car platform, 957.

SNOW SHED—

Injury to stockmen passing over freight car by, 954.

SNOW SLIDE—

Liability of passenger carrier for, 948, note 49.

SNOW-STORM—

Whether act of God, 278, 285.

SOCKET—

Passenger falling over table socket, when cognizant of its presence, 957, note 14.

SOILED TICKETS—

Duty of carrier as to, 1040.

SOLDIERS—

Unruly soldiers not "public enemies," 316.

When U. S. government in transporting its soldiers is not entitled to party rates, 543, note 51.

SON—

Ejection of father with adult, 976.

SPACE—

Between car and station platforms, 933.

SPARK—

Injury from, of locomotive, *prima facie* case of negligence, 1414.

[REFERENCES ARE TO SECTIONS.]

SPARK-CONSUMING ENGINES—

Duty of common carrier to furnish, 503.

Duty of passenger carrier as to, 912.

SPECIAL CONTRACT (SEE CONTRACT; LIMITATION OF LIABILITY BY CONTRACT)—

SPECIAL DAMAGES (SEE DAMAGES)—

When special damages must be pleaded, 1409, 1410.

SPECIAL TRAINS—

Effect of agreement with particular shipper to operate a special train for such shipper's accommodation, 44, 512, note 59.

When mandamus will lie to compel railroad company to haul special trains, 512, note 60.

Railroad company under no duty to accept passengers on special or emergency trains, 965, 1058.

SPECIFIC TERMS (SEE CONSTRUCTION OF CONTRACTS)—

SPECTATOR—

Not a passenger, 1006.

SPEED—

Running railroad train at high speed not of itself negligence, 926.

But attending circumstances, such as the character of the train, condition of the road-bed, sharpness of curves, etc., may make it negligence, 926.

When carrier liable for excessive speed although passenger was standing on platform of car, 926, note 26.

Nothing can justify carrier in running train at high speed over track known to be in a dangerous condition, 926, note 26.

Making up lost time, 926, note 26.

When coach proprietor liable for racing or improper speed, 959.

"SPENT" BILL OF LADING—

Effect of assignment of, 777, note 49.

SPUR TRACK (SEE SIDE TRACK)—

Whether carrier liable as warehouseman if he permits goods to remain on car on spur track after consignee has assumed exclusive control over them, 711, note 25.

SQUALL OF WIND—

Whether act of God, 275, 276, 277.

[REFERENCES ARE TO SECTIONS.]

STAGE-COACH—

- Proprietors of, when common carriers, 68.
- Delivery to driver of stage-coach, 111.
- Contracting to carry by one coach, carrier liable for loss if he sends by another, 619.
- Due degree of care in driving stage-coach might be recklessness in running railroad train, 898.
- Use of open and closed steps on stage-coaches, 952, note 5.
- Driver of coach on dangerous route must be cool, self-possessed and prudent, 958.
- Carrier liable for negligence or incompetency of, 959.
- Driver of coach must select least dangerous route, 959.
- Must caution passengers in passing over dangerous part of route, 959.
- Liable for accident from racing or improper speed, 959.
- When passenger has been put in dangerous position by negligence of driver and injures himself in attempting to escape, carrier liable, 959.
- Or where accident occurs through intoxication of driver, 959.
- Overturning of, *prima facie* case of negligence, 1414.

STAGE-OWNER—

- Common carrier, when, 68.
- Not usually liable as common carrier for goods intrusted to him except passenger's baggage, 85.
- Proprietors of stage lines employing drivers for different sections of road, and dividing profits and losses, are partners, 249, 250.
- Otherwise, when each bears expenses and receives profits of his own section, one acting as agent for collection of fare for others, 250.
- Or where there is a division of gross receipts, 250.
- Proprietors of connecting stage lines each responsible for misconduct of driver jointly employed, 252.
- Liability of connecting stage-coaches for lost baggage, 260, 261.
- Proprietor of passenger stage-coach must provide reasonably safe conveyance, drawn by steady horses, with secure harness, and competent driver, 898, note 17.
- Where stage-owner uses ferry, liable for negligence of ferry company, 916.

STAGE PROPERTIES—

- Not baggage, 1249.

[REFERENCES ARE TO SECTIONS.]

STAIRWAYS—

Accumulations of snow and ice on stairways of station, 937, note 33.

STALLS—

Liability of carrier for furnishing cars with defective stalls or bedding, 509.

STAMP—

Omission of agent to stamp ticket, 1053, note 39.

Refusal of agent to, 1054.

STAMPEDE—

When carrier not liable for injuries due to stampede of other passengers, 900.

STANCHION—

When giving way of stanchion is peril of the sea, 488.

STANDARD-GAUGE CARS—

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

STANDING IN CAR—

Passenger standing in car while in motion, not chargeable with contributory negligence, 1216.

Passenger may leave his seat in car for any reasonable purpose, 1216, note 1.

Whether passenger standing in car while train in motion chargeable with contributory negligence, usually a question for jury, 1216, and note 5.

Passenger standing in car while train in motion, must exercise for his safety such care as situation demands, 1216, note 5.

Passenger standing in caboose when train in motion, usually chargeable with contributory negligence, 1217.

But circumstances may excuse passenger's conduct in standing in caboose when in motion, 1217.

Passenger standing in caboose when seats full, not chargeable with contributory negligence, 1217, note 14.

STARTING—SUDDEN—

Carrier liable for, as passenger is entering passenger elevator, 101, note 43.

Carrier liable for, as passenger is entering vehicle, 1111.

Or while leaving it, 1118.

STARVATION—

Death of animals from, 634.

[REFERENCES ARE TO SECTIONS.]

STATEMENTS—

Of bailee, when evidence, 33.

Whether statements of member of state railroad commission or of governor of state are material on question of reasonableness of rates, 578.

Of station agent inadmissible to vary ticket contract, 1052, note 36.

Statements of agent misleading passenger, 1060.

STATE REGULATION OF RATES—

State legislatures have power to prevent unjust and unreasonable discrimination by carriers operating within the state, 574.

State has right to pass on reasonableness of contract between connecting roads for joint action in transportation of persons or property, 574, note 8.

And has general power to fix a maximum rate, 574, note 8.

But power to regulate is not power to destroy, 574.

Legislature cannot fix maximum rate and then make exceptions to it, 574, note 9.

State regulation must not amount to taking property without due process of law, 574.

State may establish boards or commissions, 574.

But not with final and exclusive powers, 574.

Illegal excessive rates may be recovered back, 574.

Penal statutes regulating rates strictly construed, 574.

Power of a state railroad commission to establish rates, 575.

Extent of judicial interference is protection against unreasonable rates, 575.

Rates must first be fixed before courts can interfere, 575.

A state has no control over interstate rates, 576.

Reasonableness of a state rate must be determined without reference to interstate business, 577.

Railway companies not entitled to earn the same percentage of profits upon all classes of freight carried, 577.

State commission may reduce freight on a particular article, 577.

Burden on carrier to impeach such action of commission, 577.

Reasonableness of state rates should be determined by a study of the rates themselves, 578.

Whether actions or statements of commissioners or governor of state are material, 578.

Mileage as a factor on question of reasonableness, 579.

Comparison of rates as a criterion of reasonableness, 580.

Reasonableness of rates under Uniform Bill of Lading, 580.

[REFERENCES ARE TO SECTIONS.]

STATE REGULATION OF RATES—con.

A rate on a single article may be unreasonable, 581.

Exorbitant rates not permissible in order to pay dividends, 581.

Carrier entitled to reasonable profit on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Cost of replacing physical structures too narrow a basis, 583.

How far road's capitalization and bonds should be considered, 583.

Effect of sworn return for purposes of taxation, 583.

Courts should be fully advised of the receipts and earnings of a railroad, 584.

Cost of local business is greater than cost of interstate business, 585.

Effect of connecting and branch lines in determining the reasonableness of a rate, 586.

Effect of consolidation of several roads, 586.

A rate, though reasonable, should not tend to create a monopoly, 587.

Discrimination, to be actionable, must be unjust, 588.

Difference in commodity, or method of handling it, may justify different charge, 588.

A special rate is not always unjustly discriminative, 589.

A "rebilling" rate may be discriminative, 590.

Free passes are discriminative, 591.

An extra charge may be made for shipments received off carrier's own line, 592.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Right of carrier to recover from shipper the difference between the discriminative and regular rate, 594.

Through rate may be less than sum of locals, 595.

Right of state to compel the issuance of mileage tickets at reduced rates, 596.

Discrimination between localities, 597.

Whether competition is a material factor as between localities, 597.

A state may regulate domestic long and short haul rates, 598.

Shipment is an entirety in reference to long and short haul clause, 599.

Special contracts with shippers not impossibilities under long and short haul clause, 600.

[REFERENCES ARE TO SECTIONS.]

STATE REGULATION OF RATES—con.

Competition not a factor under Kentucky long and short haul clause, 601.

STATEROOM—

Liability of carrier by water for baggage taken by passenger into, 1268.

In New York, carrier by water liable as innkeeper, 1271.

STATION AGENT (See AGENT; SERVANT)—

Implied powers of, 460-462.

Station agent has implied power to make provision for clearance of customs duties, 462, note 19.

So he has implied power to agree to furnish reasonable number of cars for live stock by certain date, 462, note 19.

Or that person in charge of animals may ride in stock car, 462.

Verbal contract of shipment entered into by station agent will ordinarily bind carrier, 462, note 19.

Agents of each associated carrier have authority to bind the other carrier, 462, note 19.

Effect of circulars sent by carrier to shipper on authority of agent, 462, note 19.

In America, carrier's agent may agree to deliver beyond carrier's terminus, 462.

But agent cannot agree to forward freight by passenger train, 462.

Authority of local and station agents to agree to furnish cars on a given day, 630.

Delivery by express company to station agent of railroad at small way-station, 718.

Entering freight train at direction of station agent, 964.

Duty of carrier to protect passengers while in station or depot, 989.

In order to make carrier liable, latter's agent in charge of station must have known, or had opportunity to know, that injury was threatened which he could prevent or mitigate, 989.

Carrier liable if agent stands by without any attempt to prevent the wrongful act against the passenger or an intending passenger, 989.

Carrier liable if he fails to guard against long continued and notorious acts of third persons, such as scuffling by cabmen, etc., 989.

Notice to employe whose only duties are to clean up waiting room and keep up fires is insufficient, 989, note 17.

[REFERENCES ARE TO SECTIONS.]

STATION AGENT—con.

If passenger charges men with robbery, it is no breach of duty on part of carrier to start the train at the appointed time without waiting for them to be given into custody, 989, note 17.

Carrier held liable where plaintiff pelted with eggs, station agent not interfering, 989, note 18.

Carrier liable where no warning was given that persons were fighting with pistols near car steps and passenger was shot while alighting, 989, note 18. *

Carrier held liable for station agent's failure to stop use of insulting language to lady in his presence, 989, note 18.

Liable for failure of station agent to restrain drunken man who flourished knife and sang vulgar songs in his presence, 989, note 18.

Liability of carrier for station agent shooting passenger, 1099, note 33.

Has no authority to direct passenger to board moving train, 1181, note 14.

STATIONAL FACILITIES—

Common carrier—

Duties of common carries as to stational facilities, 510.

Under section three of Interstate Commerce Act, 556.

Carrier must provide suitable places for feeding and watering live stock, 638.

Carrier must provide suitable facilities for unloading goods or stock, 715.

Passenger carrier—

Liability of railroad company for insufficient stational facilities where station is used conjointly with another company, 917.

Duty of railway carriers in respect to platforms, approaches and station accommodations, 928.

Bound to make safe platforms and approaches thereto, and grounds reasonably near to such platforms, 928.

But railroad not bound to furnish safe premises at place where ticket is purchased, if purchased from a ticket broker, 928, note 9.

Disagreeable stational accommodations may excuse act of imprudence in passenger in entering car before drawn up to platform, 928.

Railroads may enforce regulations as to smoking in station, 928.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

Character of accommodations required varies with amount of business done at particular points, 929.

At flag stations, railroads may be relieved altogether of obligation to furnish depots or platforms, 929.

Passenger cannot recover from railroad where he knowingly goes to flag station at night, and is made sick through exposure to the weather, 929, note 11.

If large crowds attracted through low rate excursions, railroads should provide accommodations commensurate with number of persons invited to be present, 929.

Railroad liable where large excursion crowd attracted, and by using only one of five possible gates at station, passenger is injured, 929, note 14.

Gist of action against railroad company is implied assurance that facilities are in good condition, 930.

Not liable for injuries to passenger where latter falls down unfinished step of unfinished and unused station, 930.

Nor are stational facilities required where person takes passage upon a construction train to go over unfinished railroad, 930.

If necessary, fire should be provided in waiting room, 931.

Failure to provide such accommodations *prima facie* evidence of negligence, 931.

In Texas, duty imposed by statute, 931.

Defective chairs or benches must be removed from waiting room, 931.

Question as to whether retiring places must be provided is not definitely determined in America, 931.

In Kentucky, required by statute, 931.

In England, held not to be necessary adjuncts and charge may be made when provided, 931.

In America, custom is to the contrary in cities and towns, 931.

Probably not required in small villages and hamlets, 931.

If retiring place provided, railway company liable for negligence in maintaining or repairing it, 931.

Length of time that waiting rooms and retiring places must be kept open is usually regulated by statute, 931.

In absence of statute, must be kept open a reasonable time before arrival or departure of trains, 931.

What is a reasonable time is a question of fact, 931.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

Thirty minutes before departure of train may be reasonable, 931, note 24.

But where passenger misses train through negligence of agent, state of weather and condition of passenger may require that station be kept open until arrival of next train, 931, note 24.

Baggage rooms are not private rooms, as against owners of baggage who are permitted to enter, 932.

Invitation of baggage master to enter baggage room is invitation of company, 932.

In such case room must be made safe for passenger, 932.

If one enters baggage room against express regulation of company, and without permission of baggage master, only entitled to care due trespasser, 932.

Whether permission has been given to enter baggage room is a question for the jury, 932.

Railroad must construct platforms which will form safe and convenient means of exit to and from cars for all passengers, 933.

Law does not determine of what material platform must be constructed, 933, note 26.

As a general rule, no imputation of negligence where platform for years has proved adequate, safe and convenient, 933, note 26.

When evidence as to unsound condition of platform at points other than where accident occurred is competent, 933, note 26.

Negligence to construct platform so far below lowest car steps that passengers must make dangerous leaps, 933.

Female passenger not compelled to turn around and let herself down backwards, 933, note 27.

Constructing platform 26 inches below level of lowest car step is negligence, 933, note 27.

But 18 inches not negligence *per se*, 933, note 27.

Whether platform was sufficiently elevated is a question of fact relating to "foresight" and not "hindsight," 933, note 27.

May be negligence to require passenger to alight on small box on ground, 933, note 27.

Negligence to have such a space between station and car platform that passengers may fall between them and be injured, 933.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

Constructing platform between tracks so narrow that passengers must stand dangerously near train is negligence, 933.

But not required that platform be so constructed that nearest edge is safe as standing place while trains are passing, 933.

When evidence may be introduced that witness had met with accident at same place, before happening of accident to plaintiff, 933, note 28.

Question of negligence in construction of platform is usually one for the jury, 933.

Negligence to maintain platform with dangerous slope toward lower track platform, 933.

Existence of hole in platform, after knowledge of its condition, is gross negligence, 933.

When evidence of holes allowed by carrier to exist in platform some time before passenger's injury is inadmissible, 933, note 33.

When it is negligence to leave uncovered water box set in ground where train usually stops, 933, note 33.

Railroad company not liable for mere accidents to passenger on safe platform, 933.

Nor where passenger, when injured, was using platform for purpose for which it was not adapted, 933.

Railroad company not bound to provide platform away from station for persons attempting to board train while in motion, 933.

Nor for persons who accidentally fall from train, 933.

Passengers must use platforms intended for them, 934.

When injured on platform, or part of platform, used exclusively for freight, railroad company not liable, 934.

Railroad bound to keep platform of station free from obstructions, 935.

Every indulgence of carrier in permitting objects to remain on station platform not necessarily negligence, 935.

If depot platform used for freight, carrier must exercise degree of care commensurate with the added danger, 935.

Leaving empty milk cans on platform, 935, note 1.

Ordinarily question whether due care has been used is one for jury, 935.

Negligence for railroad company to permit platforms to re-

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

- main covered with snow and ice so as to be unsafe for alighting passengers, 935.
- Snow or ice should be removed, or salt or ashes scattered over them, 935.
- May be negligence to permit mail bag to remain on platform, 935.
- Railroad liable for negligently leaving hose, trucks or skids in dangerous position, 935.
- Accumulations of oil or grease on station platform may be negligence, 935.
- Liability of railroad company where obstruction on platform is due to third persons, 935.
- Liability for banana skins on platform, 935.
- Liability for careless handling of truck by baggage master, 935, note 6.
- Railroad company not liable for accidental tripping of passenger over foot of baggage master, 935.
- Platform and station must be well lighted, 936.
- Lights should be maintained for reasonable time before and after departure of trains, 936.
- Character of lights required depends on character of station, 936.
- Fact that train is special train no excuse for not having platform properly lighted, 936.
- Carrier liable if through failure to provide proper lights passenger falls over hampers, switch handles or other obstructions and is injured, 936.
- Railroad company not bound to light station for express company's agent who comes to baggage room several hours before express train is due, 936, note 12.
- Whether evidence as to lighting of station before or after the action is admissible, 936, note 12.
- Effect of delay of train on lighting of platform, 936, note 18.
- Person coming to station after last train is gone cannot recover for injuries sustained by extinguishment of lights, 936.
- Company not liable where person recklessly walks off in darkness caused by temporary removal of lights, 936.
- Nor where person injured when all the light is furnished that experience has shown to be necessary, 936.
- Failure to light station not proximate cause of assault on

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

- female passenger by third person while passenger seated there alone, 936.
- Carriers by railroad must provide reasonably safe means of getting to and from stations or trains, 937.
- Carrier liable if it erects bridge giving access to its station, and bridge falls, 937.
- Or if it fails to plank bridge, place proper guard rails around it, or keep it in repair, 937.
- Railroad liable where passenger is injured by being pushed from narrow passage way of boards to train, 937.
- Railroad company only bound to provide one safe exit from trains, 937.
- In absence of knowledge that only one route is provided, passenger may use other route which appears safe and designed for foot passengers, 937.
- Whether passenger was justified in selecting particular route, or whether route was safe, are questions for the jury, 937.
- If passengers adopt customary route with acquiescence of carrier, latter must take reasonable precautions to render such route safe, 937.
- Immaterial in such case whether carrier furnished route, 937.
- If passenger injured by accumulation of ice on customary route for egress from station, carrier liable, 937, note 29.
- When carrier provides safe and commodious exit from train, passenger must use it, 937.
- In such case carrier not liable if passenger leaves train and proceeds along track, 937, note 30.
- Or goes off in darkness somewhere else, 937.
- Or climbs over locked gate and goes in another direction, 937.
- Or disregards safe route and goes by path where trucks are being unloaded from baggage car, 937, note 30.
- Responsibility of railroad for accumulations of snow and ice on stairways of station, 937, note 33.
- Sidewalk adjoining station must be kept in reasonably safe condition, 937.
- If car does not reach platform, and passenger is invited to alight, reasonably safe way must be provided to platform, 937.
- Negligence for freight train to block crossing or passage way to depot when passenger train is taking or discharging passengers, 937.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

Railroad cannot escape liability for failure to exercise ordinary care by showing delegation of duty to third person, or ownership of stational facilities in another, 938.

Railroad company liable for defect in stile used by passengers with its acquiescence, 938.

Not relieved from liability by use of union depot, controlled by separate corporation, unless use made obligatory by statute, 938.

Liability of intersecting railroads for maintenance and lighting of common depots or platforms, 938.

Passenger not justified in incurring danger to avoid inconvenience, 939.

Carrier not liable for not guarding against accidents not reasonably to be anticipated, 940.

Carrier not liable for injury due to slipping on brass nosing of step leading to platform which had been worn smooth by constant use, 940.

Carrier need not provide hand railings to station stairway when it is protected by walls on both sides, 940.

Carrier not liable for injury due to stumbling over weighing machine, used for a long time without an accident, 940.

Nor where horse broke away and came upon platform and injured passenger, 940.

Nor for explosion of heating apparatus in hotel where ticket office was maintained, 940.

Degree of care in respect of stational arrangements not so great as in respect of tracks and running machinery, 941.

In respect of stational arrangements, carrier bound only to ordinary care in view of dangers to be apprehended, 941.

Exceptional rule in Nebraska by statute, 941, note 50.

Duty of carriers by water in respect to wharves, approaches and stational facilities, 942.

Must provide reasonably safe and suitable docks, 942.

Duty also extends to safely mooring vessel to dock, 942.

But passenger must exercise at least ordinary care for his own safety, 942.

Carrier liable if insufficient light provided, 942.

Or if passenger injured by stepping into hole on wharf, 942.

Carrier must provide suitable gang plank, 942.

When guard rails necessary for gang plank, 942.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Passenger carrier*—con.

Roadways and bridges leading to wharf or boat must be maintained in reasonably safe condition, 942.

Liability of ferry company to passengers for station facilities and mooring boat, 942, notes 6, 9 and 13.

Passenger chargeable with contributory negligence if he does not avail himself of arrangements for a safe boarding or landing, 942.

Carrier liable for injuries to passenger from careless handling of vessel's appliances, 942.

Powers of such corporations to adopt regulations as to admission into depots and stations—

Have right to adopt reasonable regulations to exclude third persons from grounds and buildings as their business and convenience of passengers may require, 943.

Such regulations must be general and impartial, 943.

Presumption exists that their reasonable rules and regulations are for the public advantage, 943.

Railroad may regulate frequenting of depots by hotel-keepers or their servants, 943.

May exclude persons who come to sell lunch to passengers, 943.

Railway companies may adopt reasonable regulations regulating conduct of passengers themselves while in depot or on station grounds, 943.

May prohibit passengers from sleeping in waiting rooms, or lying on benches, 943.

May require white and colored passengers to occupy different rooms if accommodations are equal, 943.

Railway company cannot prohibit entrance of passenger's own carriage to station grounds to carry him or his goods to or from the train, 944.

Nor entrance of carriage of hackman, which by contract made elsewhere with passenger, has become carriage of passenger *pro hac vice*, 944.

Right of railroad company to grant exclusive right to certain favored hackmen to solicit patronage in its station or grounds in dispute, 944.

Right to grant such exclusive privilege upheld by courts of England, by the Supreme Court of the United States, and by the Supreme Courts of Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island and Virginia, 944.

[REFERENCES ARE TO SECTIONS.]

STATIONAL FACILITIES—*Powers of such corporations to adopt regulations as to admission into depots and stations—con.*

Hackmen and cabmen may, however, use a public sidewalk in prosecuting their calling, if such use is not materially obstructive, 944.

Right to grant exclusive privilege to favored hackmen denied in Indiana, Kentucky, Michigan, Missouri, Mississippi, Montana, and possibly by the Supreme Court of Illinois, 945.

This view based on theory that passenger should not be exploited by creation of monopoly, 945.

But under latter view railroad company may make reasonable regulations as to where hacks or cabs shall stand, 945.

Courts divided on question whether railway company can grant exclusive access to its terminal wharf to favored steamboat line, 946.

STATUTE OF FRAUDS—

When sale void under, who may sue, 1319.

STATUTE OF LIMITATIONS—

Stipulations for shorter time to bring action than that fixed by, 448.

STATUTES AFFECTING CARRIERS—

Statute making bill of lading conclusive evidence of weights in bills of lading, 158, note 29; 162, note 40.

Harter Act, see *HARTER ACT*.

Construction of fourth section of Harter Act, 160, note 37.

Making bills of lading negotiable, 176.

Statutes affecting right to sue, 197, 198.

Statutes making first carrier liable as on contract of through carriage, 234, 235.

Statutes limiting liability, 344.

English Land Carriers' Act, 393-395, 522.

Statutory requirements as to signatures on bills of lading, 413.

Interstate Commerce Act, 523, *et seq.*

State statutes regulating rates, 574, *et seq.*

As to feeding and watering live stock, 638, note 49.

Federal twenty-eight hour act in regard to feeding, watering and resting cattle, 638, note 49.

Regulating right to sell goods, 889.

Statutes affecting the management and making up of passenger trains, 923, and notes.

[REFERENCES ARE TO SECTIONS.]

STATUTES AFFECTING CARRIERS—con.

Regulating time for keeping waiting-rooms open, 931.

Requiring railroads to fence right of way, 955.

Requiring separation of passengers, 972.

Regulating fares, 1023.

Effect of statutory requirement that conductor wear badge to show his authority to collect fares, 1027.

STATUTORY ACTIONS—

How affect common-law remedies, 1342.

STATUTORY PENALTIES—

Pleadings in action for, 1341.

STEAM—

Escape of steam, when a peril of the sea, 489.

Carriers by steam required to exercise even more exact skill, care and diligence than other carriers, 898.

STEAMBOAT (See CARRIER BY WATER; VESSEL)—

Contracting to carry by steamboat, carrier liable if he carries by sailboat, 618, 619.

Or *vice versa*, 619.

STEAM PIPES—

In vessel should be carefully inspected and made serviceable before sailing, 374.

Valves should be closed, 374.

STEARINE—

If stearine is shipped as “tallow” the stevedore is entitled to rely on the description in the bill of lading, 688, note 12.

STEERAGE PASSENGERS—

Representation that no steerage passengers are carried on boat, 1067, note 36.

No duty to furnish bedding to, 1158.

STEPS—

When use of three instead of four steps on railway car is not negligence, 911, note 23.

Falling down unfinished steps of unfinished station, 930.

Brass covering on steps of steamboat, 953, note 8.

Placed by conductor on side of train opposite depot platform, passenger using, not chargeable with contributory negligence, 1185, note 26.

Jumping from steps of car, held contributory negligence, 1190.

Alighting from steps of vehicle when danger obvious, 1190.

[REFERENCES ARE TO SECTIONS.]

STEVEDORES—

Improper stowage by, 353, note 23.

Even though time for loading or unloading is definitely fixed, charterer or consignee not liable for delay where stevedoring is done by an employe of the ship's agent, 834.

When charterer not liable for mistakes of stevedores, 839, note 70.

STEWARD—

Assault on passenger by, 1096.

STILE—

Defect in, used by passengers with carrier's acquiescence, 938.

STOCK CAR—

Stockmen voluntarily and unnecessarily riding in, chargeable with contributory negligence, 1202.

Stockman riding in, not chargeable with contributory negligence where entire duty of caring for stock is assumed by him, and contract does not require him to ride in caboose, 1202.

Stockman riding in, not chargeable with contributory negligence when so riding in pursuance of contract, 1202.

Stockman riding in, not chargeable with contributory negligence when so riding in pursuance of custom, 1202.

Stockman riding in, in violation of terms of contract, chargeable with contributory negligence, 1202.

STOCKMEN (See STOCK CAR)—

Injury to, passing over freight car, by snow shed, 954.

Where trainman in authority induces stockman to look after stock at a certain time, train should not be moved without notice to stockman, 1003, note 32.

Where stockman given directions to reach connecting train, path should not be made dangerous by operation of trains and engines, 1003, note 32.

Stockman voluntarily and unnecessarily passing over top of cars, while train is in motion, chargeable with contributory negligence, 1203.

Stockman passing over tops of cars while train in motion not chargeable with negligence as a matter of law where custom established for stockmen to do so, 1203.

Stockman passing over top of car, while train in motion, in violation of terms of contract, chargeable with contributory negligence, 1203, note 16.

[REFERENCES ARE TO SECTIONS.]

STOCKYARDS COMPANY—

Effect of agreement between connecting carriers to deliver to stockyards company to make transfer, 136. ●

Whether subject to Interstate Commerce Act, 524.

Delivery by railroad company to stockyards company under Interstate Commerce Act, 556.

STOOL—

Not negligence to permit use of movable stool for operator in passenger elevator, 101.

STOP—

Duty to stop at station for passengers, 1110.

Passengers must be allowed reasonable time to enter vehicle in safety, 1111.

Carrier must stop to let passengers out at usual place, 1117.

Must be given reasonable time for that purpose, 1118.

Carrier must not stop for passenger to alight at improper place, 1122.

Refusal of employes to stop train, no excuse to passenger for attempting to alight while train in motion, 1177, note 3.

Refusal of employes to stop train, no excuse to passenger for attempting to board it while in motion, 1181.

STOP-OVER—

Right of passenger to, 1041.

STOPPAGE IN TRANSITU—

When right of, may be exercised, 757.

Only arises in favor of one who stands in relation of vendor to the goods, 757.

Exercise of right by vendor excuses non-delivery by carrier, 758.

No particular form or mode necessary in exercise of right, 758.

Act or declaration of vendor or agent countermanding delivery all that is necessary, 758.

Usual mode, by simple notice forbidding delivery to vendee or requiring that goods shall be held subject to vendor's order, 758.

Vendor may resort to possessory action at law or bill in equity, 758.

Notice may be given by the vendor or his agent, 759.

Not necessary that agent should have special authority to stop goods, 759.

General authority, or for purposes of consignment, sufficient, 759.

Stoppage by stranger without any authority cannot be ratified after goods have come into vendor's possession, 759.

[REFERENCES ARE TO SECTIONS.]

STOPPAGE IN TRANSITU—con.

Goods must be in transit from vendor to vendee in order that right of stoppage should be exercised, 759, note 6.

Notice should be given to person in possession of goods, 760.

If to his employer or agent, under circumstances to afford opportunity to send orders to person in possession, 760.

Right can only be exercised against one discovered to be bankrupt or insolvent after sale, 761.

Insolvency or bankruptcy must be evident, 761.

What is sufficient evidence of, 761.

Actual insolvency not essential, 761, note 9.

Right of stoppage *in transitu* defeated by assignment of bill of lading, when, 762.

Effect of resale by vendee without actual delivery or assignment of bill of lading, 762, note 10.

Right of a pledgee of a bill of lading on exercise of vendor's right of stoppage *in transitu*, 762, note 10.

Right of stoppage *in transitu* not defeated by attachment or garnishment by creditors of consignee, 763.

Effect of attachment by vendor, 764.

Neither acceptance of draft nor negotiation of notes defeats vendor's right of stoppage *in transitu*, 765.

Necessary to exercise of right that goods should be in possession of middleman, 766.

Not necessary that they should be in the possession of carrier, *qua* carrier, 766.

Sufficient if in his possession as warehouseman, 766.

Sale to carrier in consideration of unpaid freight and other pre-existing debts does not make carrier a *bona fide* purchaser, 766, note 20.

How long goods will be deemed in transit, 767.

Actual or constructive delivery defeats right, 768.

After actual delivery to consignee, reshipment by him to further point does not revive right, 768.

When right will be defeated although goods have not come into actual possession of vendee, 769.

Carrier cannot of his own will become warehouseman for vendee, 769.

Intentions of both must concur, 769.

Existence of carrier's unpaid lien for freight raises strong presumption he holds as carrier, 769, note 28.

[REFERENCES ARE TO SECTIONS.]

STOPPAGE IN TRANSITU—con.

Delivery at vendee's store at the time in possession of sheriff or mortgagee does not defeat right, 769.

Transitus completed when goods delivered at consignee's warehouse, 770.

Or where he intends them to remain until further orders, 770.

Terminated by wrongful refusal of carrier to deliver to consignee, 770.

But not when demand of consignee unauthorized, 770.

Quaere, whether goods in actual possession of vendee, so as to defeat right of stoppage *in transitu*, when he receives them for transportation in his own vehicle, 771.

Recovery of actual possession by vendor not necessary to render right of stoppage *in transitu* effectual, 772.

After notice to carrier, vendor constructively in possession, 772.

Upon refusal to redeliver, vendor may maintain trover against carrier or other person into whose possession goods have come, 772.

But consignor must pay carrier's freight, 772, note 38.

Carrier should refuse to surrender goods if vendee solvent when right attempted to be exercised, 773.

Carrier acts at his peril in either case, 773.

Not necessary that insolvency should have been evidenced by overt act before right attempted to be exercised, 773.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432, 774.

In case of doubt, carrier may resort to legal proceedings to ascertain who entitled to possession of goods, 775.

Lawful stoppage protects carrier, 773.

Lien of carrier superior to right of stoppage *in transitu*, 872.

Even after part delivery carrier may maintain his lien for whole charges on balance undelivered as against vendor's right of stoppage *in transitu*, 872.

But lien for general balance, good as between carrier and consignee, cannot prevail against vendor's right of stoppage, 872.

Contingent right of stoppage *in transitu* not sufficient interest in goods to entitle consignor to sue in tort, 1315.

STOPPING PLACE—

Carrier not required to stop all trains at every station, 1060.

Passenger must ascertain if train stops at his station, 1060.

[REFERENCES ARE TO SECTIONS.]

STOPPING PLACE—con.

How he may ride if it does not, 1060, 1061.

Cannot require train to stop except at regular stopping place, 1060.

At what place trains may stop, 1110, 1117.

STORAGE—

Carrier may charge for storage while holding as warehouseman after goods have reached their destination, 714.

Consignee failing to pay freight, carrier may store at his expense, when, 880.

In such case warehouseman holds for carrier, 880.

Deposit may be made in name of carrier, 880.

Such deposit neither a conversion of the goods nor a discharge of the carrier's lien, 880.

STORE—

Delivery of goods at vendee's store at the time in possession of sheriff or mortgagee does not defeat vendor's right of stoppage *in transitu*, 769.

STORM (See TEMPEST; PERILS OF THE SEA)—

The degree of diligence to be exercised by the carrier in caring for goods when overtaken by a storm, 311.

When storm is peril of the sea, 488, and notes.

Effect of loss by storm where carrier has delayed, 626.

Charterer's liability for demurrage may be restricted against storms, 841.

STORMY DAYS—

When excluded from lay days, 837 and 837, note 55.

STOWAGE—

Master responsible for safe stowage under deck, 169.

Upon failure to perform this duty and sacrifice of goods to common safety those stowed under deck do not contribute to loss, 169.

May be authorized to carry on deck by usage of trade or consent of owner, 169.

Relying on latter, should be careful that consent is so expressed as to be available as evidence, 169.

Evidence that shipper saw goods stowed on deck not admissible to vary legal import of bill of lading silent on that point, 169.

"Stowage" used in two senses in section one of Harter Act, 351.

Stowage with a view to the proper trim of the vessel, 352.

[REFERENCES ARE TO SECTIONS.]

STOWAGE—con.

Carrier liable if vessel too heavily laden and damage results to cargo, 352.

Responsibility for such stowage rests upon the carrier alone, 353.

Stowage with reference to the natural characteristics of the cargo carried, 354.

Stowage of liquid cargo, 355.

Duty of ship to provide proper dunnage, 356.

Stowage of delicate and easily tainted goods, 357.

Goods should be secured from possibility of shifting, 358.

Proper stowage at commencement of voyage may be made improper by change of vessel's trim during voyage, 359.

General duty of common carrier as to stowage on vessels, 602.

Effect of shipper's knowledge of negligent stowage, 602, note 17.

Stowage of household goods, 602, note 18.

Effect of failure to provide proper dunnage for sugar, 602, note 18.

Effect of cargo getting "adrift," 602, note 18.

Duty of master of sea-going vessel to stow goods in the hold unless authorized by contract or well established custom to stow on deck, 603.

Bill of lading silent as to manner of stowage called "clean bill of lading," 603.

Parol evidence not admissible to vary, 603.

Carrier liable for loss of goods stowed on deck without consent of owner, though necessarily jettisoned in storm, 603.

In such case balance of cargo not liable to contribution, 603.

In absence of bill of lading, or when it is silent as to stowage, contract is to stow under deck, 604.

Established usage in particular trade, or of particular class of goods, will justify carriage on deck, 605.

Dangerous goods should be stowed on deck, 605.

So with live animals, 605.

By custom of particular trade lumber may be, 605.

In such case owner entitled to contribution for loss by jettison, 605.

Stowage must be on deck where safety of goods requires, 605.

Notice not to carry in hold must be called to attention of carrier, 605, note 29.

Carrier liable for injury to goods stowed in hold, when such injuries caused by other goods, without proof of wilful negligence, 606.

[REFERENCES ARE TO SECTIONS.]

STOWAGE—con.

If usage to carry salt as part cargo of general ship, not negligence to take it on board with other goods, 606.

Negligence to take goods on board in such condition as to injure other goods, 606.

Stowing plumbago near cocoanut oil, or flour near kerosene, 606, note 30.

No usage to carry tea and camphor in same vessel, 606, note 31.

Arsenic may be carried in hold with olive oil, if properly stowed, 606, note 31.

Stowage of goat skins near casks of citron improper, 606, note 32.

Rule requiring stowage under deck confined to ships which sail upon seas and great lakes, 607, 608.

No application to steamboats on rivers, 608.

On last named vessels great care should be taken to prevent exposure to fire, 608.

Stowage upon freight cars of railroad companies, 610.

STRANDING OF VESSEL—

Is a fault in "navigation" within meaning of Harter Act, 383.

When not within exception against perils of sea, 492, note 70.

On stranding of vessel, carrier bound to make all reasonable efforts to preserve goods, 644.

STRANGER—

Carrier delivering to stranger must show him entitled to possession, 749, 769, *et seq.*

Stoppage *in transitu* by stranger without any authority cannot be ratified after goods have come into vendor's possession, 759.

When passenger carrier is liable although the immediate cause of injury is the negligent act of a third person, 913.

Duty to avert injury from obstructions placed near or on track by third persons, 925.

Passenger carrier not liable for accident caused solely by negligence or trespass of stranger, 950.

But liable when act of stranger done at request of carrier's servant or with his acquiescence, 950.

Announcement of station by stranger, 1124.

STREET CARS—

Proprietors of, are common carriers when, 68, 78.

"STRESS OF WEATHER"—

What is meant by, 502.

[REFERENCES ARE TO SECTIONS.]

STRIKERS—

Not "public enemies," 316.

Carrier may stipulate for exemption from loss caused by strikers, 421.

When liable for delay caused by strikers, 657.

Carrier's duty to protect passengers from injuries by strikers, 986.

Ordinarily not guilty of negligence in operating cars during strike of employes, 986.

But carrier cannot invite trouble by receiving mob of hostile strikers in car who are inflamed against person already a passenger, 986.

STRIKES—

Will excuse delays, when, 657.

Strike of dock laborers not caused by unreasonable conduct of shipowners will not relieve charterer when absolute promise to pay demurrage, 833, note 47.

Charterer may guard against liability for delay by strikes in charter party, 841.

Exception against strikes not affected by fact that one was brought about by enforcement of reasonable rules and regulations of merchants, 841.

Nor by fact that strike was in progress at time contract was signed, 841.

Effect of strikes where charter is silent as to time of discharge, 842.

Effect of strikes where vessel is to proceed to berth "as ordered," 950.

STUDENT—

Delivery by express company of package addressed to student to college president, 719.

SUB-FREIGHT—

Lien on, 868.

SUBROGATION—

When carrier subrogated to owner's claims, 781.

SUCCEEDING CARRIERS (See CONNECTING CARRIERS)—

SUFFOCATION—

Carrier may stipulate for exemption from liability for loss among live stock by suffocation, 419.

[REFERENCES ARE TO SECTIONS.]

SUGAR—

- Defect in rivets or bolts on vessel may make her unseaworthy as to cargo of sugar, 372.
- Damage to sugar through defect in chain locker of vessel, 375, note 33.
- Damage to sugar though leaving sea cock open, 382, note 1.
- Vessel liable for not guarding against known corrosive action of sugar drainage, 385, note 8.
- Effect of failure to provide* proper dunnage for sugar, 602, note 18.
- When platform scales necessary for weighing sugar under provision for "customary quick dispatch," 839.

SUIT (see ACTION)—

In general—

- Carrier may limit time within which suit shall be commenced, 448.
- Rule in Kentucky, 448.
- When goods seized on legal process, carrier by water must defend suit till owner notified, 744.
- Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

By carrier—

- Carrier may recover for injury to goods during bailment, 779.
- May recover possession if wrongfully withheld, 779.
- Carrier's right of action not inconsistent with right of action for same cause by general owner, 780.
- But recovery by carrier for full value bars action by general owner, 780.
- Carrier recovering full value, trustee for owner, 780.
- Satisfaction of judgment for full value passes title to property to party against whom recovery is had, 780.
- Carrier paying for property lost or destroyed while in his possession, by wrongful act of another, subrogated to owner's rights, 781.
- May recover possession from owner if taken from him wrongfully, 782.
- Or when he has agreed to hold for party having paramount title, 782.
- In trespass or trover against bailor, damages limited to value of special interest, 782.
- Carrier may not sue for freight till goods delivered, 828.

[REFERENCES ARE TO SECTIONS.]

SUIT—By carrier—con.

Right of shipowner to demurrage may be affected by his laches in bringing suit, 857.

Carrier may retake possession of goods by writ of replevin when delivery obtained by consignee through trick or fraud, 871.

Carrier's remedy against manufacturer for defect in vehicle, 909.

SULPHURIC ACID—

Railroad liable while holding as warehouseman for loss through explosion of sulphuric acid, 714, note 2.

SUNDAY—

Fact that goods are received on Sunday no excuse for unreasonable delay, 651, note 15.

Delivery of goods upon, 692.

Party entitled to goods cannot be compelled to work on Sunday in removing them, 711, note 25.

When used in reference to demurrage, "days" alone includes Sundays, 837.

Although contract of carriage void because made on Sunday, passenger carrier liable for negligence, 1017, 1232, 1233.

Fact that wrongful ejection occurs on Sunday does not affect passenger's right to recover, 1033.

SUPERCARGO—

In passing upon carrier's right to freight *pro rata itineris*, acceptance of goods by supercargo equivalent to acceptance by owner, 816.

SURGEON—

Whether carrier bound to furnish, 1163.

SURGICAL INSTRUMENTS—

When baggage, 1246.

SURRENDER—

Effect of provision in bill of lading requiring its surrender or production before delivery, 181.

Effect of custom on delivery without surrender of bill of lading, 192.

Carrier cannot ordinarily require surrender of bill of lading, 777.

SURVEYOR'S CERTIFICATES—

Possession of surveyor's certificates of not great importance in proving due diligence to make vessel seaworthy, 380.

[REFERENCES ARE TO SECTIONS.]

SWEATING—

When a peril of the sea, 489, note 60, 490, note 65, 492, note 70.

SWELLS—

Vessel unable to withstand swells of a passing vessel presumed to be unseaworthy, 369, 380, note 45.

SWINDLER—

Liability of carrier for delivery to, 669, *et seq.*

SWITCH (see FLYING SWITCH)—

A mere switch not a depot at which delivery may be made to carrier, 121, note 12; 122.

When carrier cannot refuse to accept goods at points on switch controlled by it, 512, note 60.

Under section one of Interstate Commerce Act switch connections with lateral lines and private tracks to be made when economical and practicable, 523.

Liability of passenger carrier for defective switch, 949.

Use of switches of improved patterns, 952.

SWITCHMAN—

Delivery by express company to switchman of railroad at small way-station, 718.

TACKLE—

Liability of connecting carrier attaches when transfer is commenced by means of tackle, 124.

When liability of carrier by water ceases under provision that it was to cease when goods left ship's deck or tackle, 689, note 14.

TANK—

Defect in rivets or bolt on tank may make vessel unseaworthy, 372.

TARIFFS—

Publication of tariffs required under section six of Interstate Commerce Act, 523.

Tariff rates only must be charged under section six, 523.

TEA—

Improper stowage of, 606, note 31.

TELEGRAM—

Will not justify officer in seizing goods in carrier's possession, 741, note 20.

When carrier liable for negligence in sending notice of stoppage *in transitu* over his own private wire, 760, note 8.

Shipowner not liable for failure of master to deliver telegram gratuitously to passenger, 960, note 32, 1167.

Alighting from vehicle to send, 1012.

[REFERENCES ARE TO SECTIONS.]

TELEGRAPH COMPANIES—

Whether common carriers, 95.

TELEGRAPH LINE—

When failure to have a proper and fit telegraph line for running passenger trains is negligence, 923, note 23.

TELEGRAPH MESSENGER COMPANY—

Whether a common carrier, 97.

TELEGRAPH WIRES—

When atmospheric conditions rendering telegraph wires unavailable will be an excuse for delay, 654.

TELEPHONE COMPANIES—

Whether common carriers, 95.

TELESCOPE—

Is baggage, 1246, note 27.

TEMPEST (see STORM)—

Whether tempest is act of God, 274, note 17.

TENDER—

Initial carrier must at least make tender of delivery to connecting carrier, 130.

Tender of money for freight unnecessary, 150.

Owner may tender reasonable amount, and bring action against carrier refusing to accept goods, 805.

Consignee may tender reasonable amount, and if refused, bring action for goods, 805.

If consignee pays charges and sues for excess over reasonable compensation, actual tender of reasonable charge not necessary, 805.

Owner has no right to demand possession of the goods until he has paid or tendered payment for carrier's service and advances, 864.

So, in general, carrier has no right to freight until goods tendered to consignee, 864.

Lien of carrier discharged by a tender of performance, when refused by bailee, 887.

Tender of fare by passenger, 1024.

Not bound to tender exact sum to carrier, who must furnish change to a reasonable amount, 1024.

Tender of coin worn smooth by use, 1024, note 11.

Tender of torn bills, 1024, note 11.

Carrier not obliged to accept passenger's jewelry as a pledge, 1024, note 11.

[REFERENCES ARE TO SECTIONS.]

TENDER—con.

Effect of tender after refusal to pay fare or show ticket, and ejection begun, 1085.

Cases not in harmony on this question, 1085.

Passenger cannot escape ejection by tendering fare for remainder of journey, 1085.

Or by buying ticket for remainder of way, 1085.

Rule justifying refusal to accept tender after ejection begun must be confined to cases where refusal was wilful, 1085.

Effect of tender of fare by third person, 1085.

Duty of carrier to tender back fare received before ejection, 1086.

Duty of carrier to tender back fare received when parent is ejected for non-payment of child's fare, 1087.

TENDER OF ENGINE—

Person riding on, chargeable with contributory negligence, 1218.

TERMINATION OF CARRIAGE—

By owner of goods short of destination, 661.

TERMINATION OF PASSENGERSHIP RELATION—

Acts showing termination, 1016, 1169.

THEATRICAL COSTUMES, ETC.—

Not baggage, 1249.

THEFT—(See ROBBERS)—

Carrier without hire not liable for loss by theft, provided ordinary prudence used, 23, 24, 25, 26, 27.

Liability of private carrier for hire for loss by theft, 39.

Common carrier liable, notwithstanding exception against perils of the sea, for loss from theft other than by pirates, 491.

Carrier as warehouseman not liable for loss by theft without his fault or negligence, 685.

THIEVES—

Not "public enemies," 315, 316.

Carrier may stipulate for exemption from loss caused by thieves, 422.

Who included under contract for exemption, 468, 469.

Carrier liable if his servants stand by and allow thieves to appropriate contents of car, 631.

THIRD PERSON—

When passenger carrier is liable although the immediate cause of the injury is the negligent act of a third person, 913.

Duty of passenger carrier to avert injury from obstructions placed near or on track by third persons, 925.

[REFERENCES ARE TO SECTIONS.]

THIRST—

Death of animals from, 634.

THOROGOOD v. BRYAN—

The rule of, and its over-throw, 1235, *et seq.*

THROUGH CARRIAGE (see CONNECTING CARRIERS)—**THROUGH CONTRACT—**

Through contract as to passenger, through contract as to his baggage, 1296.

What constitutes through contract as to passenger is, in most respects, same as that required to constitute through contract as to goods, 1296 (See, also, ch. IV).

Parties may contract as to baggage as with reference to ordinary goods, 1296.

Although through contract as to baggage, any subsequent carrier, through whose fault loss occurs, may be held liable, 1296.

THROUGH PASSENGER—

Cannot claim advantage of local or competitive rates between intermediate points, 1042.

THROUGH RATE—

As evidence of contract for through transportation, 239, 262.

Effect of through rate in bringing carrier within scope of Interstate Commerce Act, 526.

A lower through rate not necessarily discriminative under Interstate Commerce Act, 540.

Joint rate not a basis for local rate under Interstate Commerce Act, 566.

Through rate may be less than sum of locals under state statutes, 595.

Mere acceptance of cars by connecting carrier from another carrier does not amount to ratification of a parol contract with the prior carrier for a through rate, 804, note 32.

Right of final carrier to lien where initial carrier, without authority, guarantees a lower through rate to shipper than the regular rate, 867.

TICKET BROKER—

Contract of railroad with ticket broker to sell tickets at less than regular rate is void under Interstate Commerce Act, 541.

Purchasing ticket from ticket broker, railroad company not liable for accident on broker's premises, 928, note 9.

Cannot be denied admission to cars, 970, note 25.

Injunctions against ticket brokers dealing in non-transferable tickets, 1056.

[REFERENCES ARE TO SECTIONS.]

TICKET OFFICE—

Duty to keep open, 1033.

When may be closed, 1033, notes 30, 32.

TICKETS—

Are usually required of passengers, 1028.

May be in form of mere check, 1028.

Or in form of both a receipt and a contract, 1028.

If mere check passenger not bound to read conditions on back, 1028.

If ticket purports to be contract ticket, and evidently appears to be such, passenger bound by its stipulations, 1028.

Restrictions or limitations should be supported by consideration in shape of a reduced fare, or otherwise, 1028.

Reduced fare may put passenger on notice that ticket contains restrictions, 1028.

Passenger bound to comply with reasonable by-laws and regulations in reference to purchase of tickets, 1029.

Tickets must be sold without discrimination, 1030.

Discrimination in rates in favor of commercial travelers not justifiable, 1030, note 19.

Nothing illegal in giving rates to emigrants as a class, 1030, note 19.

If commutation rates offered, carrier cannot refuse to sell commutation ticket to particular individual, 1030.

Performance of duty to sell may be enforced by mandamus, 1030.

Effect of exchange of tickets on stipulations therein, 1031.

Passengers may be required to purchase ticket before entering vehicle, 1032.

And to exhibit it to gate-keeper, 1032.

But passenger must not be subjected to unnecessary inconvenience or annoyance, 1032.

Passenger may be required to pay higher fare when paid on train, 1033.

But cash fare, together with the extra amount, must not exceed the maximum rate allowed by law, 1033, note 28.

Passenger refusing to pay higher fare on train may be ejected, 1033.

Immaterial whether other persons or the same person at different times have been allowed to ride on train for ticket fare paid on train, 1033, note 29.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

But reasonable opportunity must be given passenger to purchase ticket, 1033.

Fact that process is created by which passenger may get back excess paid, does not justify carrier in demanding higher fare when no opportunity to purchase ticket is afforded, 1033, note 30.

Railroad company not bound, however, to keep ticket office open every minute of time until it may lawfully close the same, 1033, note 30.

Reasonable time depends on size of station, amount of business, etc., 1033, note 30.

Passenger cannot complain if he does not get to station until after usual time for departure of train, and finds ticket office closed, 1033, note 32.

Passenger entering train without a ticket cannot ask to have train held until he can procure one, 1033, note 32.

Subject regulated by statute in some states, 1033.

Passenger failing to purchase on account of premature closing of office, cannot be required to pay additional fare, 1033.

Paying such additional fare, may recover back, 1033.

Ejected on refusal to pay additional fare, may recover damages, 1033.

Higher rate cannot be demanded if agent is out of tickets, 1033, note 33.

Passenger cannot resume journey unless he pays for ride he has been permitted to take when he has been carried a distance without producing a ticket or fare, 1033, note 33.

Fact that wrongful ejection occurs on Sunday does not affect passenger's right to recover, 1033.

Waiver of right to demand higher fare when paid on train, 1034.

Carrier may abandon custom to sell tickets at reduced rates, 1035.

Regulation requiring conductor to expel passenger refusing to exhibit ticket, reasonable, 1036.

Passenger losing ticket may be required to pay fare, 1036.

But reasonable time must be given passenger to find it, 1036.

Passenger leaving commutation ticket at home may be expelled for refusing to pay fare, 1036.

Ticket agent's declaration to passenger who has lost or mislaid ticket that it will be all right is not binding on carrier, 1036, note 39.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

- Passenger, subject to chronic drowsiness, may stop expulsion from car by production of ticket on realizing situation, 1036, note 40.
- Time occupied in running from one station to another a sufficient opportunity for finding lost ticket, 1036, note 41.
- Conductor not required to hear evidence as to *bona fides* of passenger's excuse for not producing ticket, or to telegraph to selling agent, 1036, note 41.
- Conductor not bound to search passenger's pocket for ticket, but if he does so, must do it in good faith, 1036, note 41.
- Passenger leaving ticket at home cannot leave cash deposit with conductor on condition of its return when he gets ticket, 1036, note 42.
- Rebate or train tickets given on payment of cash fare must be produced when called for, 1037.
- Regulation that ticket may be demanded in exchange for check, reasonable, 1038.
- Passenger refusing to comply with, may be expelled, 1038.
- This rule applicable to regulation that commutation tickets be surrendered on last trip, 1038, note 44.
- But passenger cannot be compelled to surrender ticket without receiving evidence of payment of fare in return, 1038.
- But having done so, cannot be expelled by another conductor, 1038.
- In such case may recover compensatory damages, 1039.
- When passenger pays for a ticket to a certain place, and agent by mistake issues ticket for shorter distance, carrier liable for expulsion, 1039.
- Torn, soiled or mutilated tickets, 1040.
- Journey once commenced must be continued without intermission, 1041.
- Passenger cannot claim right to stop at any intermediate place, and continue journey on subsequent train, 1041.
- In California, rule changed by statute, 1041, note 52.
- Ticket agent at intermediate station has no authority to waive rule of a continuous passage, 1041, note 52.
- Conductor of one train need not recognize authority of conductor of another train to grant right of stop-over, 1041, note 52.
- But passenger has reciprocal rights against company, 1041.
- Passenger cannot knowingly take train which does not go to destination and tender ticket for fare, 1041.
- Passenger who knows train will not stop at his destination cannot stop at earlier point and demand "stop-over" check, 1041.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

Through passenger cannot claim the advantage of local excursion or competitive rates between intermediate points, 1042.

Ticket issued without limitation good within period prescribed by statute of limitations for similar contracts, 1043.

State legislature may enact that limitations to the contrary shall not be valid, 1043, note 1.

But carrier may otherwise limit time within which ticket shall be used, 1043.

Such a limitation construed most strongly against carrier, 1043.

What notice of limitations required, 1043.

Posting of notices in waiting rooms, etc., 1043.

Effect of selling tickets at reduced rates, 1043.

Some courts regard limitations as to time of use of ticket as regulations of the carrier and not as matters of contract, 1043.

Distinction, under view that they are matters of contract, between tickets which are mere tokens or checks and contract tickets, 1043.

Stipulation purporting to limit use of ticket to specified time construed as fixing latest time for commencing and not for completing journey, 1044.

Ticket good for certain date only not good for subsequent date, 1044.

Ticket good if passage begun before midnight of last day, 1045.

Fact that change of trains is necessary, immaterial, 1045.

If ticket expires on Sunday when no trains are run, it will be good for use on Monday, 1045.

Where time has expired, though by negligence of carrier, unless passenger has started on journey, he should pursue his remedy against carrier for breach of contract, 1045.

But passenger should not suffer for any casualty or incapacity in the initial or any connecting line, 1045.

Carrier liable if second conductor refuses to honor ticket although first conductor has received instructions to do so, 1045, note 14.

Time limitation must be reasonable, 1046.

If unreasonable, passenger must avail himself of first opportunity to complete his journey under the contract, 1046.

"Good for one seat" means seat on same train upon which holder has once taken passage, 1046, note 17.

"Good for this trip only" has been held to relate to time of using ticket and not to date, and to mean trip must be continuous, 1046, note 17.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

"Good for twenty days" only means for one continuous trip although twenty days have not elapsed, 1046, note 17.

Statute giving longer life to ticket than that expressed upon its face will not be given extraterritorial effect, 1046, note 17.

Carrier may waive time limitation by accepting ticket holder as passenger after expiration of time, 1047.

But waiver as to one ticket will not constitute waiver as to another, 1047.

Rule as to continuous carriage different in case of coupon tickets, 1048.

Coupon ticket does not usually import contract of through carriage, 1049.

Carrier issuing through ticket for transportation on route of connecting carrier, agent for latter, when, 258-261, 1048, 1049.

Not responsible for safety of passenger beyond his own line, 1049.

Or baggage beyond his own line, 1049.

Holder of coupon ticket may stop at end of each line represented by coupons, and resume within a reasonable time, 1049.

This rule has been extended to cases where passengers hold tickets having separate coupons for different divisions of same line, 1049.

But contract for through passage may be made, 1050.

Railroad may, by its advertisements, treat entire journey over its own and connecting lines as entire trip for which it alone would be responsible, 1050, note 25.

Railroad selling trip over connecting line to real terminus of its own road liable for negligence of connecting line, 1050, note 25.

Railroad operating another line cannot escape responsibility for negligence by showing charter did not authorize such operation, 1050, note 25.

Whether through contract exists is question of fact, 1050.

Parol evidence of real contract admissible, when, 1050, 1052.

When nothing shown but sale of ticket, presumption that carrier is responsible for his route alone, 1050.

When net profits divided among successive carriers, liable as partners, 1050.

When initial carrier liable for connecting carrier's failure to provide stateroom, 1050, note 29.

When longer and shorter route, and route not designated in ticket, passenger should take shorter route, 1051.

But usage to take longer route is valid, 1051.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

If ticket does not express the entire contract, it may be shown by other proof, 1052.

Parol evidence to affect, 1052.

Not defeated by regulations not known to passenger, 1052.

Not defeated by limitations on back of ticket to which his attention was not called, 1052.

Conditions in fine print on ticket, 1052, note 34.

Distinction between tickets which are mere tokens and contract tickets, 1052.

Reduced fare tickets, 1052, and notes.

Conditions against allowing rebates, 1052, note 36.

Against assuming responsibility beyond carrier's own line, 1052, note 36.

Against carrying groceries as baggage, 1052, note 36.

When statements of station agents are inadmissible to vary ticket contract, 1052, note 36.

Person unable to read or write should make that fact known to agent, 1052, note 36.

Language in ticket of uncertain or doubtful meaning taken in strongest sense against carrier, 1052.

Passenger is bound by ticket contract, 1053.

But negligence of carrier in failing to provide agents, or to provide agents with requisite facilities, or negligence of agents in performing their duties will excuse passenger, 1053.

Negligent omission of agent to stamp ticket, 1053, note 39.

Failure of carrier to provide agent with mileage exchange tickets, 1053.

Action must be brought against carrier through whose negligence injury occurred in case of coupon tickets, 1053.

Failure of company to keep station open longer than a reasonable time no excuse for passenger failing to comply with conditions, 1053, note 39.

Round-trip tickets requiring identification, 1054.

Effect of refusal of agent at terminal points to stamp, sign or validate tickets, 1054.

Effect of passenger's refusal to make proper proof of his identity as rightful holder of ticket, 1054.

Burden of proving identity is on passenger, 1054.

Agent of carrier not compelled to accept verbal assurance of passenger as to identity, 1054.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

- But passenger only required to offer such proof as would satisfy mind of a reasonably conscientious and prudent person, 1054.
- Effect of provision that return passage shall commence on same day that passenger identifies himself, 1054, note 43.
- Agent of carrier at destination cannot bind connecting carriers by assurance to passenger that journey can be commenced on later date than that in ticket, 1054, note 43.
- Effect of passenger being unable to read or write, 1054, note 43.
- Waiver as to conditions on ticket not presumed by gateman allowing passenger to pass through gate, 1054, note 44.
- Nor from fact that other passengers have been allowed to travel without ticket validation unless custom or abandonment shown, 1054, note 44.
- Provision that coupon shall not be good if detached, 1055.
- Holder of mileage ticket cannot insist on tearing off coupons himself, 1055.
- Unless waived by general custom between carrier and his passengers, 1055.
- Effect of parts of round-trip ticket being detached by accident, 1055.
- Tickets transferable unless limited, 1056.
- Provision that ticket shall not be transferable, 1056.
- Non-transferable clause in commutation ticket valid, 1056, note 59.
- Insertion of fraudulent names in non-transferable ticket, 1056, note 59.
- Mileage book passes to personal representatives of deceased, and cannot be used in transporting his remains, 1056, note 59.
- Effect of purchaser's offer to identify himself by signing his name to ticket, 1056, note 60.
- Purchase of non-transferable ticket under assumed name, 1056, note 60.
- Agent has no authority to waive non-transferable clause when stipulation in ticket against agent's authority to alter or modify conditions, 1056, note 60.
- Non-transferable clause does not give carrier right to confiscate ticket, 1056.
- Although express provision for confiscation may, 1056.
- Second conductor may question person's right to ride on non-transferable ticket, 1056.
- Injunctions against ticket-brokers dealing in non-transferable tickets, 1056.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

Passenger should truthfully answer questions of conductor concerning his identity, 1057.

Provision that ticket shall not be good on certain trains, 1058.

Passenger holding ticket good on excursion train cannot ride on general train, 1058, note 3.

Ticket for freight train not good on passenger train, 1058, note 3.

Failure to connect with proper train of another road does not entitle second-class passenger to ride on limited express, 1058, note 3.

Passengers on branch lines who miss connections have no right to ride on limited or special trains on which ticket does not entitle them to ride, 1058, note 3.

Waivers by gatekeeper, 1058, note 3.

Railroad may run special limited trains for those desiring sleeping accommodations, 1058, note 4.

Passenger can go only in direction which ticket indicates, 1059.

How where by mistake conductor tears off return coupon instead of going coupon of round-trip ticket, 1059, 1065, note 29.

How when train does not stop at passenger's destination, 1060.

Passenger bound to inquire if train stops at station to which ticket entitles him to ride, 1060.

If passenger boards wrong train after such inquiry, not obliged to pay for ride to first station at which train regularly stops, 1060.

But rule does not apply to holder of season ticket, 1060, note 7.

And such a passenger must pay fare beyond first regular stop, 1060.

Duty of carrier where passenger buys ticket to flag station, 1060, note 7.

Remedy of passenger where he is misled by statements of carrier or agents into taking train which does not stop at destination, 1060.

When connecting road not liable for representations of foreign ticket agents as to stopping places, 1060, note 9.

Proof should be confined to statements of agent contemporaneously with purchase of ticket, 1060, note 9.

Effect of marking ticket "Good for this day and train only," 1060, note 9.

"Good on passenger trains only" not a representation that all passenger trains stop at all stations, 1060, note 9.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

Right of carrier to eject on refusal of passenger to leave train which does not stop at his destination, 1060.

Special contract for stopping train at particular station valid, 1060.

How when passenger is given obviously wrong ticket, 1061.

Rule where ticket apparently good is not sufficient under carrier's regulations, 1062.

Effect of agent being out of interchangeable mileage exchange tickets, 1062, note 19.

Fact that amount demanded was trifling cannot be considered in mitigation of damages where passenger refuses to pay additional fare wrongfully demanded, 1062, note 19.

Where ticket on its face entitles passenger to be carried, carrier cannot set up custom to issue such tickets on certain days only, 1062, note 19.

Purchase of ticket for wife by husband, 1062, note 19.

Liability of separate carriers for acts of joint agent, 1063.

How where conductor on first line tears off coupons of second line, 1064.

As between passenger and conductor the ticket produced must govern, 1065.

Application of this rule does not extend to cases where ticket sufficient on its face and declared by agent to be good, but not good in fact according to carrier's regulations, 1065.

Duty of conductor where surrounding circumstances show it is probable ticket was issued by mistake, 1065, note 26.

Right of passenger to refuse to leave the car, 1065.

Rule in Michigan as to ejection of passengers on account of insufficiency of ticket, 1065.

Failure of conductor of first train to give passenger written evidence of right of stop-over, 1065, note 29.

Remedy of passenger who is not carried as agreed, 1066.

Passenger entitled to nominal damages at least for mistake of carrier's agent in inserting name in mileage book, 1066, note 31.

Remedy of passenger where carrier's agent misdirects him as to use of ticket, 1066, 1067.

Damages include compensation not only for increased expense, loss of time and inconvenience, but also for mortification, mental suffering and any indignities, 1066.

Effect of representation that no steerage passengers are carried on boat, 1067, note 36.

[REFERENCES ARE TO SECTIONS.]

TICKETS—con.

Passengers expected to exercise ordinary intelligence and prudence, however, 1067.

Carrier not bound by directions or information given by agent in matter not within scope of his authority, 1067.

Directions by conductor to passenger on leaving wrong train as to course he should pursue, not within scope of conductor's authority, 1067, note 40:

But direction by conductor to passenger as to his conduct on the train, or in getting off or on train, are within scope of his authority, 1067, note 40.

When directions of brakeman may be relied on by passenger, 1067, note 40.

Rights of passenger where his ticket has been purchased for him by third person, 1068.

Conditions printed upon, limiting carrier's liability, 1299.

Binding on passenger if ticket imports special contract, 1299.

See, also, 1069.

But such conditions must properly form a part of contract embodied in ticket, 1299.

Conditions printed upon ticket not importing special contract, not binding on passenger unless assented to by him, 1299.

Conditions printed upon ticket, no evidence in carrier's favor of a special contract when written or printed on back of ticket, 1299. See, also, 1070.

Conditions printed upon ticket, not binding on passenger when misled by statements of carrier's agent, 1299, note 14. See, also, 1070.*

To avail carrier, such condition must be printed in language which passenger understands, 1299, note 14.

Must not be obscurely printed on ticket, 1299, note 14. See, also, 1070.

Condition on ticket as to amount of baggage, valid when reasonable, 1299, note 14.

Not applicable to baggage upon which excess charges have been paid, 1299, note 14.

TIDE—

Whether reflux of tide is act of God, 289.

TIMBER (See LUMBER)—

Section three of the Interstate Commerce Act applies to timber and manufactured products thereof which are excepted by section one, 555.

[REFERENCES ARE TO SECTIONS.]

TIME—

- When bill of lading silent, parol evidence inadmissible to negative presumption goods were to be delivered in a reasonable time, 168.
- Limitation of time within which suit shall be brought is governed by law of forum, 208.
- Conditions limiting time within which claims shall be made for loss are usually valid, 442.
- Whether action *in rem* against a vessel or *in personam* against the owner is immaterial, 442, note 40.
- Condition limiting time within which claim shall be made must be reasonable, 443.
- Whether condition was reasonable is ordinarily a question for the jury, 443.
- Carrier may waive benefit of such conditions, 444.
- What constitutes such a waiver, 444.
- Inducing owner to delay presentment of notice, 444.
- Acting on verbal notice, 444, note 6.
- Setting up other defenses on trial, without alleging non-compliance with this condition, 444, note 6.
- But waiver on prior occasions will not amount to waiver in later case, 444, note 6.
- Nor is there a waiver when it is expressly provided that no agent shall have power to waive, 444.
- Condition that claim for damages must be filed in certain time will be construed as referring only to claims for injuries to goods themselves, and not to claims for damages from delay, 445.
- Effect for failure to make delivery at all, 445.
- Condition no defense to action for misdelivery where carrier falsely asserted he still continued to hold the goods, 445, note 14.
- So failure to present a notice of claim within time specified no defense where carrier has been guilty of a conversion, 445.
- But stipulation is valid although carrier is holding goods as warehouseman, 446.
- Conflict of authority as to question on whom rests the burden of proof, 447.
- Some courts hold burden of proof is on owner of goods to show he has complied with the condition, 447.
- Some courts hold burden of proof is on carrier to show condition was reasonable and owner's failure to comply with it, 447.
- Rule in Illinois, 447.

[REFERENCES ARE TO SECTIONS.]

TIME—con.

Carrier may limit time within which suit shall be commenced, 448.
Rule in Kentucky, 448.

Consignee of goods delivered by carrier by water must remove goods within a reasonable time, 694.

Ticket issued without limitation good within period prescribed by statute of limitations for similar contracts, 1043.

State legislature may enact that limitations to the contrary shall not be valid, 1043, note 1.

But carrier may otherwise limit time within which ticket shall be used, 1043.

Such a limitation construed most strongly against carrier, 1043.

What notice of limitations required, 1043.

Posting of notices in waiting rooms, etc., 1043.

Effect of selling tickets at reduced rates, 1043.

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Distinction, under view that they are matters of contract, between tickets which are mere tokens or checks and contract tickets, 1043.

Stipulation purporting to limit use of ticket to specified time construed as fixing latest time for commencing and not for completing journey, 1044.

Ticket good for certain date only not good for subsequent date, 1044.

Ticket good if passage begun before midnight of last day, 1045.

Fact that change of trains is necessary, immaterial, 1045.

If ticket expires on Sunday when no trains are run, it will be good for use on Monday, 1045.

Where time has expired, though by negligence of carrier, unless passenger has started on journey, he should pursue his remedy against carrier for breach of contract, 1045.

But passenger should not suffer for any casualty or incapacity in the initial or any connecting line, 1045.

Carrier liable if second conductor refuses to honor ticket although first conductor has received instructions to do so, 1045, note 14.

Time limitation must be reasonable, 1046.

If unreasonable, passenger must avail himself of first opportunity to complete his journey under the contract, 1046.

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[REFERENCES ARE TO SECTIONS.]

TIME—con.

“Good for this trip only” has been held to relate to time of using ticket and not to date, and to mean trip must be continuous, 1046, note 17.

“Good for twenty days” only means for one continuous trip although twenty days have not elapsed, 1046, note 17.

Statute giving longer life to ticket than that expressed upon its face will not be given extraterritorial effect, 1046, note 17.

Carrier may waive time limitation by accepting ticket holder as passenger after expiration of time, 1047.

But waiver as to one ticket will not constitute waiver as to another, 1047.

Rule as to continuous carriage different in case of coupon tickets, 1048.

TIME OF TRANSPORTATION—

Carrier contracting to send goods to destination within prescribed time, not excused by absolute impossibility of performance, 625.

Blockade of port or inevitable accident no excuse, 625.

Nor inability to get goods of particular quality agreed to, 625.

Connecting carrier liable for failure to deliver to succeeding carrier in prescribed time, 625, note 13.

Declaration of duty to carry in a “reasonable” time not sustained by proof of a contract to carry in a prescribed time, 625, note 14.

Effect of loss by storm where there has been a delay by the carrier, 626.

Carrier not excused where time is prescribed by circumstances beyond his control, 627.

Loss by freshet, 627.

Shipper must not be in default, 628.

Carrier may agree to hold the goods for transportation until a future date, 629.

Implied authority of agent to agree to furnish cars on given day, 630.

Authority of local and station agents, 630.

Carrier must complete transportation in reasonable time, 651.

Mere delay in transportation of goods no excuse for abandonment by owner, 651.

And not a conversion, 651.

Damages for delay in transportation of dead body, 651, note 14.

Mere rush of business no excuse for failure to transport with reasonable dispatch, 651, note 14.

[REFERENCES ARE TO SECTIONS.]

TIME OF TRANSPORTATION—con.

Fact that goods are received on Sunday no excuse for unreasonable delay, 651, note 15.

Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.

When initial carrier is liable for negligent delay in delivering to succeeding carrier, 651, note 16.

Mere delay will not sustain action of replevin unless demand for return of goods made, 651.

Owner may recover any reasonable expense occasioned by delay, 651.

What is reasonable time, question of fact, 652.

Inadequacy of loading facilities, 652, note 20.

Carrier bound to transport perishable property immediately, 652, note 20.

Liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.

Negligent delay in transportation of live stock renders carrier liable, 652, note 20.

How far carrier responsible for unavoidable delay, 653.

Unavoidable delay in the shipment of live stock, 653, note 21.

Delay through insufficiency of engines, 653, note 22.

Delay through fall of dew, 653, note 22.

Delay through acceptance of enemies' goods, 653, note 22.

What will excuse delay, 654.

Delay through necessity of repairs, 654.

Delay through snow rendering road impassable, 654.

Washing away of bridge, 654.

Low stage of water, 654.

Freezing of canal or river, 654.

Collision through negligence of another carrier, 654.

Obstruction through negligence of another company, 654.

Destruction of part of road or city by fire, 654.

Atmospheric conditions rendering telegraph wires unavailable, 654.

Washouts caused by unprecedented floods, 654.

Delay through obstructions by ice, 655.

Embargo delays carriage, 655.

Circumstances may make delay a duty, 656.

Delay through strikes, mobs or riots, 657.

Shipper should receive notice from carrier of such delay, 657, note 42.

[REFERENCES ARE TO SECTIONS.]

TIME OF TRANSPORTATION—con.

Carrier must complete carriage when cause of delay removed, 658.

Burden of proof on carrier to show transportation in reasonable time after impediment removed, 658, 659.

TIME TABLES—

Duty of passenger carriers to conform to, 1104.

TOOLS—

When baggage, 1246, 1253.

TOPS OF CARS—

Stockman voluntarily and unnecessarily passing over, while train is in motion, chargeable with contributory negligence, 1203.

Stockman passing over, while train in motion, not chargeable with negligence as a matter of law where custom established for stockmen to do so, 1203.

Stockman passing over, while train in motion, in violation of terms of contract, chargeable with contributory negligence, 1203, note 16.

TORN TICKETS—

Duty of carrier as to, 1040.

TORT (see ACTIONS AGAINST CARRIERS)—

In actions against carriers of goods, same law governs whether the form of action is *assumpsit* or tort, 204.

When carrier liable for tort of servant, 1093, *et seq.*

Difference in damages from action on contract, 1358.

TOW—

Construction of clauses reserving leave to tow and assist other vessels, 623.

TOW-BOAT—

Owner of tow-boat not common carrier, 92.

TOYS—

When constitute baggage, 1244, note 10.

TRACK—

Steel rails not required because less liable to decay, nor are granite cross ties, 897.

Liability of railroad company for obstructions on track, 925.

Passenger leaving train and going along track, 937, note 30, 1016, note 23.

Passenger walking upon, chargeable with contributory negligence, 1173, note 1.

[REFERENCES ARE TO SECTIONS.]

TRACK—con.

Standing between, by passenger, is contributory negligence, 1184, note 21.

Passenger upon, after having been wrongfully ejected from train, not chargeable with contributory negligence, 1234.

Passenger must leave track at earliest practicable opportunity, 1234.

Passenger seeking to return by way of, after having been carried beyond his destination, chargeable with contributory negligence, 1234.

Crossing track to reach or leave cars, see CROSSING TRACKS.

TRAFFIC ARRANGEMENT—

Mere traffic arrangement as to division of receipts will not create a partnership between connecting carriers, 263, note 19.

TRAINS—

Crawling under cars to reach or leave, 1220.

TRAMPS—

Duty of carrier towards, 1001.

TRANSFER COMPANY—

Not a connecting carrier, when, 247.

Delivery of baggage by, when such company's liability will terminate, 1294.

Delivery of baggage at destination to, when liability of carrier will terminate, 1294.

TRANSFERS—

Carrier must respect transfers of bill of lading, 179.

Effect of transfer of bill of lading after delivery of the goods, 182.

TRANSFER OF TICKET—

May be made unless ticket specifies otherwise, 1056.

"TRANSIT" COMPANY—

When "commissions" to "transit" company will be held to be illegal as rebates, 539.

TRANSPORTATION—

OF GOODS—

In General—

Carrier liable, notwithstanding exemption, if he departs from the stipulated method of transportation, 480.

General nature of carrier's duty as to transportation, 494, *et seq.*

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—con.

Duty to supply himself with necessary appliances—

First duty to provide himself with proper appliances for transportation, 495.

Must be reasonably sufficient for purposes of business he undertakes, 495.

But not bound to provide for extraordinary occasions, or an unusual influx of business, 495.

Unusual press of business may justify refusing to accept goods, 495.

Cannot discriminate in favor of one station or shipper, 495.

On unexpected influx of business, facilities should be equitably apportioned among shippers, 495.

Common carrier accepting goods, bound to carry within reasonable time, 495, 496.

Must inform shipper of necessary delay, 495, 496.

When bound to carry to destination, must inform shipper of delay on connecting route, 496.

Burden of proof on carrier to show he could not furnish cars needed without jeopardizing other business, 496.

Shipper must give carrier reasonable notice when car required for his exclusive use, 495, note 6.

Duty of carrier then to advise shipper whether car will be furnished, 496, note 7.

Carrier liable if he misleads shipper in that respect, 496, note 7.

Means of transportation must be safe and suitable, 497.

Defect in which will not excuse, 497.

Can guard himself against liability from such cause only by contract, 497.

And generally, when defect can be traced to his negligence, cannot protect himself by contract, 497.

In state where he can so protect himself, contract must be explicit, 497.

If carrier by water, vessel must be seaworthy, 497.

Bound to know condition and fitness of vessel, 497.

Must provide all necessary appliances, 497.

Must provide competent master and crew, 497.

Mere knowledge of defect in vehicle does not amount to assent by shipper, 497, note 15.

Carrier not excused because defective vehicles used by him are owned by another, 498.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Duty to supply himself with necessary appliances*—con.

Nor can carrier devolve on shipper the duty of inspecting vehicle, 498.

Initial carrier liable for defective vehicle furnished by him, although damage develops on line of connecting carrier, 499.

This true even though initial carrier restricts liability to his own line, 499.

And even if shipper contracts that carrier shall not be liable, 499.

If shipper contracts for special vehicle unsuitable for connecting carrier's line, initial carrier must procure best adapted vehicle possible, 499.

Liability of connecting carrier for defective vehicles received by him from initial or another carrier, 500.

Liability of connecting carrier for defective bedding, 500.

Vehicles must be inspected while in transit, 501.

In selection of vehicles, carrier must guard against exigencies of weather reasonably to be expected, 502.

Duty as to providing appliances for preventing the escape of sparks, 503.

Use of exposed cars, 504.

Duty to furnish refrigerator or ventilated cars, 505.

Icing or re-icing cars, 505.

Use of open or closed cars, 506.

Carriage of cotton on open car, 506, note 40.

Carriage of oil on open car, 506, note 40.

Carriage of precious metals in bullion room of vessel, 507.

How where shipper selects the vehicle himself, 508.

Carrier's duty in furnishing cars for live stock, 509.

Liability of carrier for furnishing cars affected with any contagious disease, 509.

Liability of carrier for furnishing cars with defective stalls or bedding, 509.

Duty of common carrier as to station facilities, 510.

Duty of common carrier as to providing cattle-yards, 510.

Duty of carrier to provide pens and keep them in repair and order, 510.

Effect of "owner's risk" exemption on carrier's duty to unload live animals, 510, note 52.

Initial carrier liable for injury sustained by animals in pens,

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Duty to supply himself with necessary appliances*—con.

although injury does not develop until they have passed into the possession of a connecting carrier, 510.

Must carry for all alike—

Duty of carrier to accept goods for transportation, 511.

Must carry such goods as he is accustomed to carry for all persons alike, 512.

Discrimination by common carrier unlawful, 512.

When mandamus will lie to compel carrier to furnish coal cars, 512, note 59.

When railroad company will be compelled to accept goods at points on a switch, 512, note 60.

When mandamus will lie to compel railroad company to haul special cars or trains, 512, note 60.

Difference in situation of shippers may justify a preference, 513.

Whether railroad companies are bound to furnish facilities to express companies without discrimination, 514.

Authorities in conflict on this question, 514-516.

The "Express Cases" in the United States Supreme Court, 517.

Right of one express company to use the facilities of another express company, 518.

Giving preference to one connecting carrier over another, 519.

Giving preference to one shipper over another, 520.

Rates must be reasonable, 521.

Must not be unjustly discriminative, 521.

Mere inequality of charges not unjust discrimination, 521.

Secret rebate unlawfully discriminative, 521.

The English rule, 522.

Interstate Commerce Act—

Text of Interstate Commerce Act, 523.

Definition of term "transportation" under Interstate Commerce Act, section one of act, 523.

Who are subject to the act, 524.

What shipments are subject to Interstate Commerce Act, 525.

Effect of joint rates in bringing a railroad within the scope of the act, 526.

Commission has power to establish joint rates under certain conditions, 526.

Principal objects of act, 527.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Interstate Commerce Act*—con.

Express adoption of common law, 527.

Act must be construed broadly, 528.

Should consider interests of carrier, shippers and public, 529.

Interests of public predominant on question of reasonableness of rates, 530.

Railroad companies cannot graduate charges according to prosperity of industries, 530.

Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.

Weight and bulk of articles should also be considered, 531.

Mileage is not the controlling factor in fixing a reasonable rate, 532.

On questions of reasonableness of rates, a comparison of rates is of small importance, 533.

Greater flow of traffic in one direction will justify lower rate in that direction, 533.

Summer and winter rates may vary, 534.

Second section of Interstate Commerce Act modeled on English act, 535.

Purpose of second section, 536.

Discriminative interstate contracts void under Interstate Commerce Act, 536.

Even when rates given by mistake, 537.

Discrimination must be unjust, 538.

Milling in transit agreement not necessarily discriminative, 538.

Compressing cotton in transit need not amount to unjust discrimination, 538.

Contract is governed by classification sheet in force at date of shipment, 537, note 39.

Shippers must be placed on an absolute equality, 539.

Special rebates void, 539.

A lower through rate not necessarily discriminative, 540.

Discrimination may be in passenger service, as well as property, 541.

Reasonableness of rates not necessarily involved in section two, 542.

Distinction between wholesale rates in freight and passenger traffic, 543.

Party rates, 543.

Car load usual unit in fixing freight rates, 544.

Rebate equal to cartage charges is discriminative, 545.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Interstate Commerce Act*—con.

Payment of carrier's prior debt by carriage as discrimination, 546.

Agreement for rebate does not void contract of carriage, 547.

Effect of section two on limitations on the value of goods in bills of lading, 548.

Question of relative rates is involved in section two, 549.

Failure to pay expenses no excuse for unjust discrimination, 550.

Third section of Interstate Commerce Act modeled on English act, 551.

Section three embraces every form of unjust discrimination, 552.

Relative rates important under section three, 552.

Questions of undue or unreasonable prejudice or preference are questions of fact, 553.

Origin of goods immaterial under section three, 554.

Carriage of articles or commodities manufactured, mined or produced by carrier, 555.

Section three applies to timber and manufactured products thereof which are excepted by section one, 555.

Railroad cannot build up one port at expense of another by preferential rates, 555.

Discrimination in carriage of live stock and affording proper facilities under section three, 556.

Discrimination in coal car distribution under section three, 557.

Agreement between railroad company and shippers as to coal car distribution cannot do away with obligations of section three, 557, note 21.

Effect of shipper furnishing cars, 557.

Third section applies as well to passenger as to freight traffic, 558.

Real and substantial competition justifies dissimilarity in rates under third and fourth sections of Interstate Commerce Act, 559.

Third section does not relate to acts, the result of conditions beyond control of carrier, 560.

Competition may be between railroads, 561.

Competition of ocean lines should be taken into consideration, 562.

Interests of shipper, carrier and public should be considered, 563.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Interstate Commerce Act*—con.

Rules as to competition summarized, 564.

Condition that initial carrier shall have right to route beyond its own terminal is valid, 565.

Joint rate is not a basis for local rate, 566.

Requiring prepayment of freight by connecting carrier is not unjust discrimination, 567.

Discrimination in affording facilities for interchange of traffic, 568.

Connecting carrier does not have to pay mileage on cars of another carrier when it has cars of its own available, 568.

Railroad need not afford same facilities to rival as to its own branch line, 568.

Mere distance no criterion of "substantially similar circumstances and conditions," 568.

Company transporting partly by railroad and partly by water not obliged to allow competitor use of its own wharf, 568.

Question of similarity or dissimilarity of circumstances under section four is one of fact, 569.

Real and substantial competition a factor under section four, 570.

"Basing point system" is not illegal under section four, 571.

Competition must not be conjectural, 572.

Effect of suppression of competition at competitive points, 572.

Joint rates under section four, 573.

Joint rate for long haul should not be less than local rate for short haul, 573.

State regulation of rates—

State legislatures have power to prevent unjust and unreasonable discrimination by carriers operating within the state, 574.

State has right to pass on reasonableness of contract between connecting roads for joint action in transportation of persons or property, 574, note 8.

And has general power to fix a maximum rate, 574, note 8.

But power to regulate is not power to destroy, 574.

Legislature cannot fix maximum rate and then make exceptions to it, 574, note 9.

State regulation must not amount to taking property without due process of law, 574.

State may establish boards or commissions, 574.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*State regulation of rates*—con.

But not with final and exclusive powers, 574.

Illegal excessive rates may be recovered back, 574.

Penal statutes regulating rates are strictly construed, 574.

Power of a state railroad commission to establish rates, 575.

Extent of judicial interference is protection against unreasonable rates, 575.

Rates must first be fixed before courts can interfere, 575.

A state has no control over interstate rates, 576.

Reasonableness of a state rate must be determined without reference to interstate business, 577.

Railway companies not entitled to earn the same percentage of profits on all classes of freight carried, 577.

State commission may reduce freight on a particular article, 577.

Burden on carrier to impeach such action of commission, 577.

Reasonableness of state rates should be determined by a study of the rates themselves, 578.

Whether actions or statements of commissioners or governor of state are material, 578.

Mileage as a factor on question of reasonableness, 579.

Comparison of rates as a criterion of reasonableness, 580.

Reasonableness of rates under Uniform Bill of Lading, 580.

A rate on a single article may be unreasonable, 581.

Exorbitant rates not permissible in order to pay dividends, 581.

Carrier entitled to reasonable profits on property used by it, 582.

Usually entitled to legal rate of interest, 582.

How value of railroad's property is determined, 583.

Cost of replacing physical structures too narrow a basis, 583.

How far road's capitalization and bonds should be considered, 583.

Effect of sworn return for purposes of taxation, 583.

Courts should be fully advised of receipts and earnings of a railroad, 584.

Cost of local business is greater than cost of interstate business, 585.

Effect of connecting and branch lines in determining the reasonableness of a rate, 586.

Effect of consolidation of several roads, 586.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*State regulation of rates*—con.

A rate, though reasonable, should not tend to create a monopoly, 587.

Discrimination, to be actionable, must be unjust, 588.

Difference in commodity, or method of handling it, may justify different charge, 588.

A special rate is not always unjustly discriminative, 589.

A "rebilling" rate may be discriminative, 590.

Free passes are discriminative, 591.

An extra charge may be made for shipments received off carrier's own line, 592.

Discrimination in transfer of stock from narrow-gauge to standard-gauge cars, 593.

Right of carrier to recover from shipper the difference between the discriminative and regular rate, 594.

Through rate may be less than sum of locals, 595.

Right of state to compel the issuance of mileage tickets at reduced rates, 596.

Discrimination between localities, 597.

Whether competition is a material factor as between localities, 597.

A state may regulate domestic long and short haul rates, 598.

Shipment is an entirety in reference to long and short haul clause, 599.

Special contracts with shippers not impossibilities under long and short haul clause, 600.

Competition not a factor under Kentucky long and short haul clause, 601.

Duty as to stowage—

General duty of carrier as to stowage on vessels, 602.

Effect of shipper's knowledge of negligent stowage, 602, note 17.

Stowage of household goods, 602, note 18.

Effect of failure to provide proper dunnage for sugar, 602, note 18.

Effect of cargo getting "adrift," 602, note 18.

Duty of master of sea-going vessel to stow goods in the hold unless authorized by contract or well-established custom to stow on deck, 603.

Bill of lading silent as to manner of stowage called "clean bill of lading," 603.

Parol evidence not admissible to vary, 603.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Duty as to stowage*—con.

Carrier liable for loss of goods stowed on deck without consent of owner, though necessarily jettisoned in storm, 603.

In such case balance of cargo not liable to contribution, 603.

In absence of bill of lading, or when it is silent as to stowage, contract is to stow under deck, 604.

Established usage in particular trade, or of particular class of goods, will justify carriage on deck, 605.

Dangerous goods should be stowed on deck, 605.

So with live animals, 605.

By custom of particular trade lumber may be, 605.

In such case owner entitled to contribution for loss by jettison, 605.

Stowage must be on deck where safety of goods requires, 605.

Notice not to carry in hold must be called to attention of carrier, 605, note 29.

Carrier liable for injury to goods stowed in hold, when such injuries caused by other goods, without proof of wilful negligence, 606.

If usage to carry salt as part of cargo of general ship, not negligence to take it on board with other goods, 606.

Negligence to take goods on board in such condition as to injure other goods, 606.

Stowing plumbago near cocoanut oil, or flour near kerosene, 606, note 30.

No usage to carry tea and camphor in same vessel, 606, note 31.

Arsenic may be carried in hold with olive oil, if properly stowed, 606, note 31.

Stowage of goatskins near casks of citron improper, 606, note 32.

Rule requiring stowage under deck confined to ships which sail upon seas or great lakes, 607, 608.

No application to steamboats on rivers, 608.

On last-named vessels great care should be taken to prevent exposure to fire, 608.

Vessel liable for injury to goods in discharging cargo, 609.

Stowage upon freight cars of railroad companies, 610.

Goods must be carried in customary mode or according to directions of shipper—

All common carriers bound to carry in customary mode, 611.

Usage may be controlled by direction of owner of goods, 611.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Goods must be carried in customary mode or according to directions of shipper—con.*

Master will disregard such instructions at his peril, 611.

Accepting goods with directions to carry in particular mode or by particular route, bound to follow such directions, 611.

Carrying in different mode or by different route he becomes insurer, exceptions in contract to contrary notwithstanding, 611.

Marks on goods directing mode of shipment not to be disregarded, 611.

If goods not shipped according to instructions carrier liable even though loss occurs on connecting line, 611, note 42.

So initial carrier becomes liable as insurer if goods are delivered to other than designated carrier, or are wrongfully intrusted to another carrier, 611, note 42.

But carrier not liable for deviation from instructions when safety of goods requires it, 612.

Or in effort to mitigate damages after loss or damage on contract route, 612.

So carrier not liable for losses resulting from following directions, 612.

Carrier's duty to transport by usual direct route, 613.

If two routes usual, may select, 613.

Departure, in accordance with general and established usage, will not render carrier liable, 613.

Absence of special instructions gives carrier choice, 613, note 53.

If one of such routes dangerous or unsafe from accidental or temporary cause, must transport by the other, 614.

Shipper must be notified before carrying by dangerous or unsafe route, 614.

Option as to routes must be exercised with regard to shipper's interest, 615.

Tempestuous weather may render deviation necessary, 616.

Obligation to carry in manner provided by the contract—

Carrier contracting to transport in a particular manner or prescribed time held to strict compliance, 617.

Contracting to carry by one ship of certain line, liable for loss if he transports by another of same line, 617.

Express provision of this kind not to be varied by usage, 617.

Contracting to carry by land, cannot carry by water, 618.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Obligation to carry in manner provided by the contract—con.*

Contracting to carry by steam vessel, cannot carry by sail vessel, 618, 619.

Contracting to carry "all rail," cannot carry by steamboat, 618. So contract to send by sail boat not complied with by sending by steamboat, 619.

If contract is to send by one coach, carrier liable if he sends by another, 619.

Contracting to carry by one sea route, carrier liable if he sends by another more exposed to delay, 619.

Contracting to carry without change of cars, liable for loss if he does change, 620.

Liability of carrier where, notwithstanding an unauthorized deviation, the goods arrive on time, 621.

Consignee cannot refuse to receive goods and claim a conversion, 621.

But he may recover such damages as proximately result from such deviation, 621.

Effect of general words permitting deviations used in a printed form, 622.

Construction of clauses reserving leave to tow and assist other vessels, 623.

Carrier not liable if loss occurs through misconstruction of bill of lading by shipper, 624.

Goods must be carried at and within time agreed on—

Carrier contracting to send goods to destination within prescribed time, not excused by absolute impossibility of performance, 625.

Blockade of port or inevitable accident no excuse. 625.

Nor inability to get goods of particular quality agreed to, 625.

Connecting carrier liable for failure to deliver to succeeding carrier in prescribed time, 625, note 13.

Declaration of duty to carry in a "reasonable" time not sustained by proof of a contract to carry in a prescribed time, 625, note 14.

Effect of loss by storm where there has been a delay by the carrier, 626.

Carrier not excused where time is prescribed by circumstances beyond his control, 627.

Loss by freshet, 627.

Shipper must not be in default, 628.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Goods must be carried at and within time agreed on*—con.

Carrier may agree to hold the goods for transportation until a future date, 629.

Implied authority of agent to agree to furnish cars on given day, 630.

Authority of local and station agents, 630.

Care to be taken of goods during transportation—

In case of accident, carrier must give goods reasonable care and attention, 631-633.

Liable for loss by thieves, when servants standing by, 631.

Master may take cost of reconditioning cargo into consideration, 633.

Must give live stock proper attention as such, 634.

Duty to apply water to over-heated hogs, 634.

Liability when animal dies of starvation or thirst, 634.

Carrier should prevent hogs from "piling up," 634, note 36.

Liable if he smothers hog by placing it in steam-heated car, 634, note 36.

In case of accident, should place cars in position where shipper can attend to wants of animals, 634, note 36.

Should assist animals to their feet, 634, note 37.

In absence of special contract, carrier bound to feed and water animals, 634, note 37.

Rule applicable to carriers by water as well as by railroad, 634.

Initial carrier liable for negligence though injury develops on line of connecting carrier, 634.

What evidence admissible as to condition of cattle, 634, note 37.

Injury to cattle from cold, 634, note 37.

Space for cattle must be sufficiently ventilated, 635.

Care due pregnant or sick animals, 636.

Rule in Michigan with reference to caring for live stock, 637.

Carrier must provide suitable places for feeding and watering live stock, 638.

Federal 28-hour act, 638, note 49.

Carrier must take precautions against animals injuring each other in loading or unloading, 638.

Carrier's duty in the management of vehicles containing live stock, 639.

Liable for injury through jerks and jars, 639.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Care to be taken of goods during transportation*—con.

Shipper may assume duty by contract to care for live stock while in transit, 640.

But he must be given reasonable opportunities and facilities for doing so, 641.

Request of shipper for opportunities and facilities must be reasonable and necessary, 641.

Failure of shipper to furnish caretaker does not excuse subsequent negligence of carrier, 642.

But knowledge by carrier of shipper's omission is necessary, 642.

Carrier liable for his negligence in loading or unloading stock, notwithstanding contract that shipper shall do so, 643.

Same rule true as to shipper, 643.

Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock, 644.

Duty of carrier in general to avert injury to goods transported, 645, 646.

But the carrier is not bound to suspend his voyage to preserve the goods, 647, 648.

Time of transportation when no time agreed on—

Preference may be given in carriage to perishable goods already received, 649.

Or to goods intended for some great public need or necessity, as the Chicago fire, 649.

So preference may be given to preservation of life, 650.

Carrier must complete transportation in reasonable time, 651.

Mere delay in transportation no excuse for abandonment of goods by owner, 651.

And not a conversion, 651.

Damages for delay in transportation of dead body, 651, note 14.

Mere rush of business no excuse for failure to transport with reasonable dispatch, 651, note 14.

Fact that goods are received on Sunday no excuse for unreasonable delay, 651, note 15.

Carrier liable for full value of goods if they become worthless from negligent exposure to moisture, 651, note 16.

When initial carrier is liable for negligent delay in delivering to succeeding carrier, 651, note 16.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—*Time of transportation when no time agreed on*—con.

Mere delay will not sustain action of replevin unless demand for return of goods made, 651.

Owner may recover any reasonable expense occasioned by delay, 651.

What is reasonable time, question of fact, 652.

Inadequacy of loading facilities, 652, note 20.

Carrier bound to transport perishable property immediately, 652, note 20.

Liable for negligent delay in transportation of perishable property received from connecting carrier, 652, note 20.

Negligent delay in transportation of live stock renders carrier liable, 652, note 20.

How far carrier responsible for unavoidable delay, 653.

Unavoidable delay in the shipment of live stock, 653, note 21.

Delay through insufficiency of engines, 653, note 22.

Delay through fall of dew, 653, note 22.

Delay through acceptance of enemies' goods, 653, note 22.

What will excuse delay, 654.

Delay through necessity of repairs, 654.

Delay through snow rendering road impassable, 654.

Washing away of bridge, 654.

Low stage of water, 654.

Freezing of canal or river, 654.

Collision through negligence of another carrier, 654.

Obstruction through negligence of another company, 654.

Destruction of part of road or city by fire, 654.

Atmospheric conditions rendering telegraph wires unavailable, 654.

Washouts caused by unprecedented floods, 654.

Delay through obstructions by ice, 655.

Embargo delays carriage, 655.

Circumstances may make delay a duty, 656.

Delay through strikes, mobs or riots, 657.

Shipper should receive notice from carrier of such delay, 657, note 42.

Carrier must complete carriage when cause of delay removed, 658.

Burden of proof on carrier to show transportation in reasonable time after impediment removed, 658, 659.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF GOODS—con.

Power of owner of goods to change destination—

Power of the owner of the goods to change their destination, 660.

Carrier entitled, however, to full freight for entire distance, 660.

When refusal of carrier to change destination will amount to conversion, 660, and notes.

Right of owner to terminate carriage short of destination, 661.

Carrier may be estopped by usage in such case from demanding full freight, 661.

OF PASSENGERS—

Time at which carrier must commence transportation—

In absence of express contract, passenger purchasing ticket not entitled to transportation at particular hour, 1103.

Implied agreement to commence journey within reasonable time and prosecute without unnecessary delay, 1103.

Must use diligence to conform to published schedules and notices, 1104.

Right of state railway commission to compel carrier to make connections with train of another company, 1104, note 19.

Changing schedule without notice to ticket agent who sells ticket, railroad liable to purchaser, 1104, note 19.

Holding train for accommodation of theater patrons, 1105.

Changing schedule to conform with schedule of connecting road, 1106.

Liability of carrier where train behind time is blown from track by sudden gust of wind, 1106, note 22.

Liability of carrier for failure to transport on account of washout on road, 1107, note 25.

What elements necessary to make carrier liable for failure to have train ready, 1107.

Passenger has no right to rely on statements of station agent as to exact time train is late, 1108.

Liability for detention of or injuries to passenger en route—

Carrier liable for detention caused by wilfulness or negligence of himself and servants, 1109.

Burden of proof on carrier to show cause of delay did not arise from his negligence, 1109.

In case of unavoidable delay, carrier must adopt all reasonable means for safety and comfort of passengers, 1109.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF PASSENGERS—*Liability for detention of or injuries to passenger en route*—con.

Duty of carrier to stop trains for passengers at regular or flag stations and at passenger platforms, 1110.

Statutes affecting, 1110, note 33.

Rule in regard to stopping of freight trains carrying passengers, 1110.

Passenger must be allowed reasonable opportunity to enter vehicle in safety, 1111.

Duty of carrier may include due and timely announcement of particular trains, 1111.

Train must be stopped a reasonable time, 1111.

Carrier liable for injuries to passenger due to negligent starting of train while passenger is getting on, 1111.

Unless special reason, such as passenger's infirmity, exists, carrier under no duty to hold train until passenger is seated, 1111.

But other cars must not be backed up against car on which passenger is proceeding to seat, 1111.

Carrier liable for injuries to passenger due to extraordinary jerks and jars, 1111.

On freight trains, sufficient time for passenger to reach a place of safety in caboose must be allowed, 1111.

But carrier not liable for injuries due to jars and jolts usual to such trains, 1111.

Passenger leaving train temporarily under conductor's directions, reasonable time must be allowed for him to effect purpose and return, 1111.

Same true where stockman required to sign written contract before loading stock, 1111.

When duty incumbent on carrier to render assistance to passengers boarding train, 1112.

Carrier must furnish sufficient room and reasonable accommodations, 1113.

Right of passenger to a seat before surrendering ticket, 1113.

Duty of carrier as to accommodations when excursions advertised, 1113.

But passenger cannot insist on riding free while standing, 1113.

Extraordinary and unusual number of passengers will excuse carrier from accepting passengers, 1114.

Use of baggage car for passengers, 1115.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF PASSENGERS—*Liability for detention of or injuries to passenger en route*—con.

Carrier must allow customary intervals for refreshment and give notice of departure, 1116.

Stopping for wood, carrier not bound to notify passengers before starting, 1116, note 66.

Passenger must be put down at usual place of stopping, 1117.

Passenger entitled to have train come to full stop, and not merely to slackening of speed, 1117.

Rule with reference to stopping place of freight trains carrying passengers, 1117, note 1.

Stopping at some distance from station platform on account of snow, 1117, note 2.

Refusing to stop in retaliation on passenger for not giving carrier his business, 1117, note 3.

Conductor has no authority to promise passenger to stop at other than regular station, 1117.

Carrier must give sufficient time to alight, 1118.

Carrier liable if passenger carried to next station through being given insufficient time to alight, 1118.

Carrier liable for negligent start of conveyance while passenger alighting, 1118.

Not necessary to prove particular servant of carrier who caused the injury, 1118.

Carrier may show injury occurred through getting off moving train instead of sudden start, 1118.

Question of what is a reasonable time one for the jury, 1118.

Carrier not liable where reasonable time and opportunity given, but passenger has delayed, 1119.

Those in charge of train must not give signal for starting, however, when delayed passengers alighting in their presence, 1119, note 14.

Not liable where passenger has evaded payment of fare, 1120.

Carrier must give notice of arrival at stations, 1121.

Announcements should be intelligible, 1121, note 18.

Except where carrier's servants have notice of passenger's disability or infirmity, personal notice required, 1121.

Sufficient if announcement be made by some employe other than conductor, 1121.

Carrier not liable for failure to announce where passenger soundly asleep, 1121.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF PASSENGERS—*Liability for detention of or injuries to passenger en route*—con.

Must be careful not to invite passenger to alight at improper time or place, 1122.

Not liable for mistaken impression of passenger that car has arrived at station, 1122.

Whether failure to provide stool is negligence is a question for the jury, 1122, note 26.

In absence of notice to passengers to the contrary, alighting places must be safe at both ends of car, 1122, note 26.

Mere announcement of station not always equivalent to invitation to alight, 1123.

Effect of train coming to a full stop after announcement of station, 1123.

Effect of announcement of station by stranger, 1124.

Duty of carrier to give counter warning when announcement made by stranger, 1124.

Effect of notice to passengers to take other cars, 1125.

Carrying passengers past platforms or stations, 1126.

Must return to give passenger opportunity to alight, 1126.

On refusal to return, passenger entitled to compensation for trouble and inconvenience in getting back, 1126, note 3.

May have exemplary damages under aggravated circumstances, 1126, note 3.

Passenger chargeable with contributory negligence if he attempts to leave train while in motion, 1126.

Carrier not liable if sleeping passenger carried past station and robbed by footpads on way back, 1126, note 3.

If passenger carried past station, and conveyance started while he is alighting, carrier liable, 1126.

Where passenger required to leave car without assistance, and find way back to station unaided, carrier liable for injuries during that time, 1126.

This rule true even as to freight trains, 1126.

Not necessary that actual force be used in expelling passenger, 1126.

Liability of carrier for injuries to passenger by tripping over rails when train stopped away from platform, 1126, note 7.

Carrier not liable if passenger carried past station through passenger's own fault, 1126.

And passenger must use ordinary care to avert injuries, 1126.

[REFERENCES ARE TO SECTIONS.]

TRANSPORTATION—OF PASSENGERS—*Liability for detention of or injuries to passenger en route*—con.

Duty of holder of ticket to flag station to notify conductor of his destination, 1126.

Duty of carrier to afford assistance to passengers in alighting, 1127.

Duty to assist female passengers, or sick, aged or infirm passengers, 1127.

Duty of carrier to furnish portable steps, 1127, note 14.

Ordinarily no part of carrier's duty to awaken sleeping passengers, 1128.

But rule different in case of sleeping car, 1128.

Duty of carrier to furnish passengers necessary instructions, 1129.

Some consideration must be had for age, sex or condition of passenger where such is known to carrier, 1129.

TRANSSHIPMENT—

Carrier may claim entire freight although goods are transshipped, when, 814.

Transshipment of goods when vessel delayed, 822.

Master may act as agent of owner of vessel for making transshipment, 825.

• Master not absolutely bound to transship, 789.

TRESPASS—

Or trover, damages in, by carrier, 782.

TRESPASSER—

When passenger carrier liable for injury to passenger although the immediate cause of injury is the negligent act of a trespasser, 913.

As to strangers or trespassers, only required not to be an aggressor wantonly and to use every reasonable precaution to avoid their injury, 990.

No duty owed to trespasser unless his position of danger is known to operatives of train, and then only to use reasonable care, 990, note 20.

Authority of a railroad conductor to eject trespassers, 990, note 20.

Sharp division of opinion on question whether a brakeman has implied authority to eject trespassers, 990, note 20.

TRICKS—

Carrier's lien not lost if goods delivered through, 871. See FRAUD.

[REFERENCES ARE TO SECTIONS.]

TROVER—

Damages in, by carrier, 782.

TRUCKS—

Proprietors of, when common carriers, 68, 70.

Leaving trucks on station platform in dangerous position, 935.

Careless handling of, by baggage-master, 935, note 6.

Passenger leaving safe route and going where trucks are being unloaded, 937, note 30.

Injury to person assisting passenger by, 991, note 23.

TRUNK—

Paying for extra weight of, not sufficient to charge carrier with knowledge that it contains merchandise, 1250, note 19.

Knowledge by carrier of contents of, may be inferred from general custom or manner of doing business, 1250.

Of commercial traveler, when carrier will be charged with knowledge of contents of, 1250.

Mere placing of, at entrance to baggage-room, not sufficient to constitute a delivery to carrier, 1281.

Where delivered to passenger at destination, and same is immediately redelivered to carrier's station agent for temporary keeping, carrier no longer liable in any capacity, 1291, note 15.

Fact that trunk arrives on later train than that conveying passenger, held evidence of negligence, 1294, note 17.

TRUSTEE—

Carrier recovering full value of goods from third person, trustee for owner, 780.

When insurance by carrier for full value of goods, trustee for owner, 783.

Trustees for bondholders are common carriers, when, 77.

TRUSTEE PROCESS—

Upon carrier, effect of, 746-748.

TURNPIKE COMPANIES—

Are not common carriers, 103.

UMBRELLA—

Intrusted to porter on sleeping-car, liability of company for loss of, 1132, note 9.

UNDERCLOTHING—

When baggage, 1246.

[REFERENCES ARE TO SECTIONS.]

UNDERWRITER—

Right of insurance underwriter to sue carrier, 783, 784.

When acceptance by underwriter equivalent to acceptance by owner in determining carrier's right to *pro rata* freight, 816.

UNHEALTHY CLIMATE—

Damages for sickness caused by exposure to, may be recovered, 1429.

UNIFORM BILL OF LADING—

Reasonableness of rates under, 580.

UNION DEPOT—

Insufficient station facilities at, 917, 938.

Liability for insufficient lighting, 938.

UNITED STATES GOVERNMENT—

Property of, subject to carrier's lien, 886.

UNITED STATES TREASURY DEPARTMENT—

Delivery by express company to, 719, note 15.

UNLOADING—

Carrier may stipulate for exemption from liability for loss in unloading live stock, 419.

Injury to goods from coal dust while discharging cargo, 609.

Duty of carrier when unloading live stock, 638.

Shipper may contract to unload live stock, 640.

But he must be given reasonable opportunities and facilities for doing so, 641.

Carrier liable for his negligence in unloading stock notwithstanding contract that shipper shall do so, 643.

Same rule true as to shipper, 643.

Carrier by water must provide suitable place for landing goods, 688.

Bulky freight in car load lots ordinarily unloaded by party entitled to it, 711.

Small or package freight ordinarily unloaded by railroad company, 711.

Demurrage for delay in unloading, see DEMURRAGE.

UNNECESSARY FORCE (see EJECTION; DAMAGES)—

UNRULINESS—

Carrier does not warrant against consequences of unruliness of animal, 336, 337, 338.

[REFERENCES ARE TO SECTIONS.]

USAGE—

- Liability of private carrier for hire modified by, 40.
- Must be known and established, 40.
- Owners of stage-coaches may make themselves liable as common carriers by usage, 68.
- Usage must be shown to carry money in order to make carrier of goods or passengers liable, 86.
- Place of delivery to common carrier may be fixed by usage, 115.
- Place of delivery of baggage to carrier may be fixed by, 116.
- Question when carrier's liability for safety of baggage begins, will frequently depend on, 1281.
- Usage to receive baggage in certain mode will not always justify delivery of freight in same manner, 117.
- How duty to make delivery to a succeeding carrier affected by usage, 133.
- Effect of usage to issue bill of lading after goods are shipped, 173.
- Effect of usage to permit person to be notified to receive goods without producing bill of lading, 187.
- Effect of usage on delivery without surrender of bill of lading, 192.
- Effect of usage on delivery to person who is neither consignee nor entitled to delivery by bill of lading or its assignment, 196.
- Usage may affect right of agent to make contract for through carriage, 241.
- No usage can validate navigation by unstable ship, 369.
- Written contract not providing for a limitation of liability cannot be varied by proof of a custom to vary the contract in such respect, 412, note 5.
- How rule that receipt must be given and accepted at time of acceptance of goods is affected by usage, 416.
- Previous course of dealing may waive requirement that, unless value of goods is stated, carrier will only be liable to limited amount, 435.
- A local custom that agent of carrier cannot agree to forward directions, if unknown to shipper, cannot affect shipper, 462.
- Notorious usage may determine whether there has been a departure from contract, 480.
- In absence of bill of lading, or when it is silent as to stowage, contract is to stow under deck, 604.
- But established usage in particular trade, or of particular class of goods, will justify carriage on deck, 605.
- By custom of particular trade lumber may be, 605.

[REFERENCES ARE TO SECTIONS.]

USAGE—con.

If usage to carry salt as part of cargo general ship, not negligence to take it on board with other goods, 606.

All common carriers bound to carry in customary mode, 611.

Usage may be controlled by direction of owner of goods, 611.

Departure from usual and direct route, in accordance with general and established usage, will not render carrier liable, 613.

Express provision of contract that goods should be transported in particular manner or time is not to be varied by usage, 617.

Effect of usage on right of carrier to full freight when owner has terminated carriage short of destination, 661.

When usage of carrier by water to give notice of arrival by mail is valid, 690.

Necessity of notice by carrier by water may be waived by usage, 696.

Usage may be long continuance of same course of business with one consignee, or the uniform usage and course of business of carriers in the same trade in which he is employed, 696.

Effect of usage on choice of wharf, 698.

Effect of usage on delivery at ship's tackle, 699.

Mode of delivery by carrier by water may be established by usage, 700.

Mode or place of delivery by railroad company may be established by usage, 710.

Effect of usage on consignee's right to notice of arrival of goods, 710.

Usage of railroad company not to give notice to consignee on Fourth of July valid, 710.

How far usage may affect duty of express company to make personal delivery, 718, 719.

Amount of carrier's compensation may be fixed by usage, 804.

Local custom of no effect on right of shipper to recover freight paid in advance, 830, note 40.

Agreement for quick dispatch over-rides any customary mode of doing the work, 839.

Effect of usage upon shipowner's right to demurrage, see DEMURRAGE.

Obligation to discharge with all dispatch according to custom of port not the same as the implied obligation to discharge within a reasonable time, 839.

Usage cannot fluctuate between a high maximum and low minimum, 842, note 18.

[REFERENCES ARE TO SECTIONS.]

USAGE—con.

Charterer must have cargo ready for loading except where modified by controlling usage, 845.

Where only one set of apparatus for unloading is available at a port, a usage of the port controlling the use of that apparatus will be valid, 846.

Custom of local port that vessel should wait her turn is valid, 847.

But usage cannot control express stipulation as to order of being loaded, 847.

Provision that vessel should be loaded by coal company "in turn" not affected by practice of company to give preference to its own customers, 847.

Or to sell coal to local dealers from supply which would otherwise be available for loading, 847.

Carrier may by long established usage of particular localities, or of particular classes of those engaged in that business, retain goods for general balances, 865.

Effect of usage where carrier delivers and reserves right to proceed against goods for his freight, 869.

Regulations of carrier may be waived by usage, 1080.

Usage established by railway company of putting off passengers on side of train opposite depot platform, passenger leaving train on that side not chargeable with contributory negligence, 1185.

Usage established by railway company of discharging passengers at place where no platform is provided, passenger alighting in accordance with, not chargeable with contributory negligence, 1186.

Usage established by railway company of receiving passengers at place other than depot platform, passenger attempting to board train in accordance with, not chargeable with contributory negligence, 1186.

Stockman riding in stock car in pursuance of usage not chargeable with contributory negligence, 1202.

Stockman passing over tops of cars while train in motion, not chargeable with contributory negligence as a matter of law where custom established for stockmen to do so, 1203.

VALIDATE—

Refusal of agent to validate ticket, 1054.

VALIDITY—

Lex loci contractus generally governs validity of limitations of carrier's liability, 212.

[REFERENCES ARE TO SECTIONS.]

VALISES—

Injury to passenger from valise in aisle, 920.

VALUE OF GOODS—

Important ingredient to be taken into consideration on question of carrier's negligence, 6.

Conclusiveness of bill of lading as to, 163-166.

Fraudulent concealment as to value, 329-332.

Contract limiting amount recoverable to certain amount must be with regard to real value of goods, 425.

Contracts that goods are of a certain value, or that their value does not exceed a certain sum, and that the carrier's liability shall not exceed that valuation, are valid, 426.

Even where loss occurs through carrier's negligence, 426.

Valuation agreement must be *bona fide* and reasonable, 427.

If owner deliberately places value on goods at carrier's request, he will be estopped from afterwards asserting that their value was more, 428.

Where valuation written on back of contract, it will be considered as notice only, 428.

Ordinarily parol evidence inadmissible to vary express valuation, 428.

But parol evidence is admissible where valuation is ambiguous, or on question of owner's assent, 428.

Construction of doubtful valuation will be against carrier, 428.

Measure of recovery where the loss is only partial, 429.

Conflict of authority on contracts limiting recovery to value of goods at time and place of shipment, 430.

Contracts limiting liability to fixed amount without regard to value of no avail in case of negligence, 431.

If goods negligently delivered after notice of stoppage *in transitu*, carrier liable for full value of goods, and not for stated value, 432.

The same is true if carrier is guilty of a conversion, 432.

Carrier may stipulate in receipt that unless informed of value of goods he will be liable only to limited amount, 433.

Shipper should inform carrier of value of goods and compensate him accordingly, 433, 434.

But knowledge of the character of the goods or previous course of dealing may waive requirement that, unless value of goods is stated, carrier will only be liable to limited amount, 435.

By English Land Carriers' Act liability in some cases limited to £10, 436.

[REFERENCES ARE TO SECTIONS.]

VALUE OF GOODS—*cor.*

Declaration of value made by shipper conclusive against him under that act, 436.

Shipper is bound to disclose value of the goods when there is a special contract to that effect, 437.

Or when a shipper has notice that carrier will be liable only to a limited amount unless value is disclosed, 437, 438.

Notice under English Land Carrier's Act, 439, 440.

Some American cases hold notice from previous course of dealing valid, 441.

Value of goods should be considered in fixing a reasonable rate under Interstate Commerce Act, 531.

Inducing carrier through false valuation of goods to give a lower freight rate, 806, note 37.

VARIANCE—

In duplicates or triplicates of bill of lading, shipper's controls, 155.

Between charter party and bill of lading, 156.

Declaration of duty to carry in a "reasonable" time not sustained by proof of a contract to carry in a prescribed time, 625, note 14.

VEGETABLES—

Carrier not liable for injury to vegetables through following shipper's directions as to mode of carriage, 612, note 51.

VEHICLES (See CARS)—

Of Common Carriers—

Carrier must provide safe and adequate vehicles, 495, *et seq.*

Should be equitably apportioned among shippers, 495.

Carriers not excused because defective vehicles used by him are owned by another, 498.

Initial carrier liable for defective vehicle furnished by him, although damage develops on line of connecting carrier, 499.

This true even though initial carrier restricts liability to his own line, 499.

And even if shipper contracts that carrier shall not be liable, 499.

If shipper contracts for special vehicle unsuitable for connecting carrier's line, initial carrier must procure best adapted vehicle possible, 499.

Liability of connecting carrier for defective vehicles received by him from initial or another carrier, 500.

[REFERENCES ARE TO SECTIONS.]

VEHICLES—*Of common carriers*—con.

- Vehicles must be inspected while in transit, 501.
- In selection of vehicles, carrier must guard against exigencies of weather reasonably to be effected, 502.
- Duty as to providing appliances for preventing the escape of sparks, 503.
- Use of exposed cars, 504.
- Duty to furnish refrigerator or ventilated cars, 505.
- Icing or re-icing cars, 505.
- Use of open or closed cars, 506.
- Carriers of cotton on open car, 506, note 40.
- Carriage of oil on open car, 506, note 40.
- Carriage of precious metals in bullion room of vessel, 507.
- How where shipper selects the vehicle himself, 508.
- Carrier's duty in furnishing cars for live stock, 509.
- Liability of carrier for furnishing cars affected with any contagious disease, 509.
- Liability of carrier for furnishing cars with defective stalls or bedding, 509.

Of Passenger Carriers—

- Liability of passenger carrier for latent defects in vehicle, 903-905.
- For defect due to fault of manufacturer, 906-909.
- Carrier responsible if he equips his vehicle with unsafe appliances, 911.
- Liability of carrier for defective seat in vehicle, 911.
- For defective fastening on window, 911.
- For defective doors, 911.
- For misplaced coupling pins, 911.
- For defective berths, 911.
- For defective halyards, 911.
- For defective ladders on freight cars, 911.
- For engines out of repair, 911.
- For upright iron flanges on car platform, 911.
- For unguarded openings in deck of vessel, 911.
- But railway company not bound to furnish glass doors, 911, note 22.
- Liability of passenger carrier for injury caused passenger by articles brought into vehicle by another passenger, 920.
- Liability for articles falling from parcel racks, 920.
- Liability for baskets or valises placed in aisle, 920.

[REFERENCES ARE TO SECTIONS.]

VEHICLES—*Of passenger carriers—con.*

When carrier liable for injury caused passenger by dangerous articles brought into vehicle by another passenger, 921.

Duty of carrier to supply vehicle with necessary service and accommodations, 922.

Same accommodations not required on freight, as on passenger trains, 922.

Carrier must exercise the highest degree of care and diligence in respect of management and running of vehicles, 923.

Liable if he so carelessly manages his trains that a collision ensues, 923.

Liable if statutory requirements as to making up train or stopping are not complied with, 923.

When operation of train with locomotive in the rear is negligence, 923, note 18.

When running of a freight train between passenger train and station is negligence, 923, note 18.

When allowing train to stand partly on another company's track, without notifying latter company, is negligence, 923.

Carrier liable for negligent collision of ferry-boat with dock, 923.

Injury to passenger's hands or fingers by sudden closing of door or window on carrier's vehicle, 927.

In absence of custom, carrier need provide no entrances to train by express or baggage cars, 927.

Carrier under no duty to provide vestibuled trains, 927.

If vestibules are provided, carrier must see they are kept in repair, and are not needlessly left open, 927.

Passenger interfering with management of vehicle, 1206.

Warning, failure of passenger to give, to engineer, of impending collision, not contributory negligence, 1206.

Suggestion by passenger to driver of road vehicle that he is getting out of track, no excuse to carrier for injury caused by driving out of road in dark, 1206.

Negligence on one kind of vehicles may not be so on another, 1226.

VENTILATED CARS—

Duty of carrier to furnish, 505.

VENTILATION—

Space for cattle must be sufficiently ventilated, 635.

[REFERENCES ARE TO SECTIONS.]

VENTILATORS—

When carrying away of ventilators is a peril of the sea, 488.

VERBAL AGREEMENTS (see PAROL CONTRACTS)—

C. O. D. agreement with carrier may be verbal, 728.

VERMIN—

Stipulation against loss by vermin will not excuse loss by rats, 492, note 70.

VESSEL (see CARRIER BY WATER; DEMURRAGE)—

When motion or rolling of vessel is a peril of the sea, 489, note 60, 490, note 65.

Loss through ordinary wear and tear of vessel not a peril of the sea, 490, note 65.

Shipping water is a peril of the sea, 490, note 65.

Carrier must provide seaworthy vessel, 497.

Refrigerating apparatus in vessel, 362, note 40; 382, note 1; 505.

Bullion room in vessel, 507.

Stowage on vessel, see STOWAGE.

Contracting to carry by particular vessel, carrier liable for loss if he transports by another, 617.

Contracting to carry by steam vessel, carrier cannot carry by sail vessel, 618.

When vessel disabled, carrier bound to make all reasonable efforts to preserve the goods, 645, 646.

Owner of vessel responsible for unjustifiable sale, 791.

Carrier not entitled to compensation, if sale through unfitness of vessel to carry goods further, 817.

When vessel captured by public enemy, carrier loses freight and shipper goods, 826.

When consignee can use two sides of a vessel for loading or unloading he should do so, 839, note 72.

Earlier cases held vessel must be in position where charterer could begin to do his part of the work in order for lay days to commence running, 849.

Later cases give a wider latitude to vessel, 849.

May be unseaworthy as to passenger's baggage, 497, note 11.

Liability of vessel for latent defects when carrying passengers, 953, note 8.

Use of brass covering on stairs of steamboat, 953, note 8.

VESTIBULED TRAINS—

Railroad companies need not provide, 927.

[REFERENCES ARE TO SECTIONS.]

VESTIBULED TRAINS—con.

If vestibules provided, carrier negligent if they are not kept in repair, or are needlessly left open, 927.

Not negligence to open side and floor doors as train approaches station, 927, note 8.

VICE (see LIVE ANIMALS)—

Carrier not liable for losses caused by inherent nature or vice of goods, 334.

VICIOUSNESS—

Carrier does not warrant against consequences of viciousness of animal, 336, 337, 338.

Carrier may stipulate for exemption from liability for loss due to viciousness of live stock, 419.

VIGILANCE COMMITTEE—

Carrier may refuse to accept person warned away from destination by, 966.

VIS MAJOR (see ACT OF GOD)—

VITRIOL—

Carrier not bound to accept for carriage, 145, note 3.

VOMIT—

Duty to remove vomit on car platform, 957.

Fact that passenger is irresistibly compelled to vomit, no excuse for protruding head through car window, 1215, note 16.

VOYAGE—

Carrier not bound to suspend voyage to preserve the goods, 647, 648.

VULGARITY—

Ejection of passenger for, 978, note 36.

WAGONERS—

When common carriers, 68.

Duty of wagoners as to carriage of perishable fruit, 505.

WAITING-ROOMS—

Fire in, 931.

Defective chairs and benches in, 931.

Retiring places in, 931.

Time waiting-rooms must be kept open, 931.

Prohibiting passengers from sleeping or lying on benches in, 943.

[REFERENCES ARE TO SECTIONS.]

WAIVER—

- When damages for breach of oral agreement of shipment will be waived, 172.
- Knowledge of the character of the goods or previous course of dealing may waive requirement that, unless value of goods is stated, carrier will only be liable to limited amount, 435.
- Carrier may waive benefit of condition limiting time in which claim shall be made, 444.
- What constitutes such a waiver, 444.
- Inducing owner to delay presentment of notice, 444.
- Acting on verbal notice, 444, note 6.
- Going to trial on other defenses, 444, note 6.
- Treating a claim as pending and rejecting it on other grounds, 444, note 6.
- Accepting notices defective in form, 444.
- Failure to give information necessary for presentment, 444.
- But waiver on prior occasions will not amount to waiver in later case, 444, note 6.
- Nor is there a waiver when it is expressly provided that no agent shall have power to waive, 444.
- Connecting carrier by taking new and different contract waives benefit of stipulations in first contract, 472, note 10.
- Any or all of requisites of a valid delivery by carrier may be waived, 664.
- Acceptance of goods a waiver of an improper delivery, 664, 678, note 44.
- Whether acceptance of part payment for goods is a waiver of claim against carrier for damage to remainder 678, note 44.
- Whether attachment of goods by vendor waives his right of stoppage *in transitu*, 764.
- Acceptance of drafts or negotiation of notes does not defeat right of stoppage *in transitu*, 765.
- Carrier entitled to freight *pro rata itineris* when delivery at original destination waived by mutual consent, 814.
- Carrier refusing to repair ship after disaster, or to procure another vessel, or refusing to prosecute voyage, acceptance of goods by owner no waiver of further carriage, 816.
- When carrier wrongfully sells goods, acceptance of proceeds by owner no waiver of right to dispute freight, 817.
- Waivers of claim for demurrage, 857.
- Delivery of cargo and collection of freight money not a waiver of claim for demurrage, 857.

[REFERENCES ARE TO SECTIONS.]

WAIVER—con.

Presentation of bill for smaller amount not necessarily a waiver of larger claim, 859.

Nor acceptance of smaller amount by master under protest, 857.

Lien for freight waived where carrier bases his refusal to deliver on other grounds, 869.

Lien of carrier may be waived without express agreement to that effect, 875.

Such agreement may be inferred from terms of payment agreed upon, 875.

Lien waived where time for payment postponed to future date beyond time for delivery, 875.

Waived by implication when provision in bill of lading inconsistent with, 875.

Such agreement must be express or implication clear, 875.

Waiver by taking acceptance payable after delivery, 876.

But presumption exists in favor of the existence of the lien, 877.

Terms of special agreement to constitute a waiver must be absolutely inconsistent with retention of goods, 877.

If delivery can be rightfully postponed beyond date for payment of freight, lien not waived, 877.

Effect of failure of freighter where notes given for freight for accommodation of carrier, 878.

Extension of credit no waiver of lien when, 879.

Waiver of conditions in ticket, by gateman, 1054 note 44; 1058 note 3.

By ticket agent, 1056, note 60.

WAR—

Dissolves contract of affreightment, 314, 322.

When persons engaged in rebellion are public enemies, 317.

Insurrection not war, 317.

Declaration of war not necessary if actual hostilities exist, 318.

Goods taken by public enemy during deviation, carrier responsible, 319.

War acts as legal prohibition on execution or performance of contract of carriage, 322.

But embargo does not dissolve contract of carriage, 322.

Contraband goods, 323.

In time of war preference must be given military traffic under section 6 of Interstate Commerce Act, 523.

Carrier's right to *pro rata* freight when carriage interrupted by war, 819.

[REFERENCES ARE TO SECTIONS.]

WAREHOUSEMAN—

Lien of, 46.

When common carriers, 71, 72.

When liability as common carrier begins, 72.

Common carrier liable in interim only as warehouseman when goods or baggage delivered but not for immediate transportation, 112.

Carrier liable only as warehouseman when goods detained by order of consignor, 113. *

Carrier cannot become warehouseman of goods while in transit, 141, 142.

Carrier may stipulate for liability of warehouseman while goods are awaiting further conveyance, 424.

When consignee not known, carrier holds as warehouseman after goods have reached destination and pending delivery, 675.

Liability of carrier for wrong delivery while holding as warehouseman, 681.

Carrier as warehouseman not liable for loss caused by accidental fire, explosion of dangerous goods, leakage, or loss by theft without his fault or negligence, 685.

Due diligence to find consignee a condition precedent to carrier by water warehousing the goods, 695.

When carrier becomes warehouseman under Massachusetts rule as to delivery, 702.

Under New Hampshire rule as to delivery, 704.

Under New York rule as to delivery, 708.

What is reasonable time for removal of goods at end of which carrier will hold as warehouseman, 712.

When reasonable time for removal of goods has elapsed carrier holds as warehouseman, 714.

May charge storage, 714.

Liability as warehouseman continues till delivery, 714.

Must furnish reasonable facilities for getting goods, 715.

In country village same degree of security either as to fire or burglary as in larger cities cannot be required of carrier while acting as warehouseman, 717, note 12.

Where carrier holds under instructions till goods paid for, and consignee promises to pay for and take away goods within a few days, he becomes warehouseman, and liable only as such, 722.

Effect the same when consignee absent, or after reasonable diligence cannot be found, 723.

[REFERENCES ARE TO SECTIONS.]

WAREHOUSEMAN—con.

- After tender of C. O. D. goods to consignee carrier holds as warehouseman, 729.
- Right of stoppage *in transitu* may be exercised although carrier holding as warehouseman, 766.
- When possession of warehouseman will defeat vendor's right of stoppage *in transitu*, 769.
- When goods stored for charges by carrier with another warehouseman, latter holds for carrier, not for owner, 786.
- Lien extends only to charge as carrier, and not as warehouseman, 866.
- Consignee failing to pay freight, carrier may store at his expense, when, 880.
- In such case warehouseman holds for carrier, 880.
- Deposit may be made in name of carrier, 880.
- Such deposit neither a conversion of the goods nor a discharge of the lien, 880.
- When warehouseman liable to carrier as for a conversion, 880.
- Carrier bound to use reasonable care while holding goods in pursuance of his lien, 881.
- Carrier only liable as, where passenger fails to call for baggage within reasonable time, 1291.
- May sue for damage to goods, 1305.

WAREHOUSES—

- Duty of carrier to supply, 510.
- Effect of usage on railroad company's duty to supply warehouses at destination, 710.
- Use of cars as, 714, note 4.

WARNING—

- Duty of carrier to warn passenger against danger or acts of imprudence, 898, 959.
- Failure of passenger to give warning to engineer, of impending collision, not contributory negligence, 1206.

WARRANTY—

- Of quantity, quality, kind or value of goods, when deduced from bill of lading, 163-166.
- Of seaworthiness, 363, *et seq.* See HARTER ACT.

WASHING AWAY—

- Whether washing away of bank is act of God, 274.
- Delay through washing away of bridge, 654.

[REFERENCES ARE TO SECTIONS.]

WASHOUTS—

- Caused by unprecedented floods as an excuse for delay, 654.
- Detention of passenger by, 1107, note 25.

WATCH—

- When baggage, 1246.
- Not negligence for passenger to place under pillow in berth of steamer, 1272, note 1.

WATER (see FEED AND WATER)—

- Carrier liable for injury to stock from furnishing it alkaline water, 634, note 37.
- Delay through low stage of water in navigable river, 654.
- Shipping water a peril of the sea, 490, note 65.
- Duty of passenger carrier to supply vehicle with drinking water, 922, note 12.
- Leaving seat in caboose to get drink of water not contributory negligence as a matter of law, 1217, note 14.

WATER CARRIERS (see CARRIER BY WATER)—**WATER-CLOSET—**

- Duty to supply vehicles with, 922, and notes.
- Not required on caboose, 922.
- Duty of carrier to provide, in stations, 931.
- Accidental locking of door of water-closet on female passenger, 957.

WATER COOLER—

- Duty to keep floor near water cooler in steerage of vessel dry, 957, note 14.

WATER PIPES—

- In vessel should be carefully inspected and made serviceable before sailing, 374.
- Valves should be closed, 374.
- Rats gnawing hole in water pipes not a peril of the sea, 488.

WAY-BILLS—

- Conclusiveness of recitals in way-bills as to condition of goods, 163, note 41.
- Effect of change in name on a way-bill or receipt given by a careless clerk on the obligation of the carrier to deliver to the real consignees at the proper destination, 667, note 8.

“WAYSIDE DEPOSITS”—

- To save trouble of hauling to regular station are at risk of owner of goods until put on car, 122.

[REFERENCES ARE TO SECTIONS.]

WEARING APPAREL—

Usually baggage, 1244, 1246, 1253.

Carrier not liable for loss of, if in present use, 1265.

On person of passenger, carrier has no lien on, to secure price of carriage, 1303.

WEATHER (see COLD; FROST; FREEZING)—

In selection of vehicles, carrier must guard against exigencies of weather reasonably to be expected, 502.

Interruption of journey, while carrier is not at fault, caused by inclemency of weather does not justify carrier in terminating it, 801.

If charterer binds himself absolutely to load or unload within a certain time, he takes the risk of bad weather preventing access to vessel, 833.

Clause in charter party that vessel is to be loaded as fast as she can receive cargo, not affected by weather conditions, 840.

When time fixed for consignee to unload from railroad car has expired, weather conditions will be no excuse, 859, note 20.

State of weather and condition of passenger may require waiting-rooms to be kept open where passenger misses train through negligence of agent, 931, note 24.

“WEATHER WORKING DAYS”—

Use of such words in charter party, 837.

When parts of days computed in, 838.

Twenty-four hours may constitute “weather working day” in some places, 838, note 61.

WEIGHERS—

Effect of consignees using their weighers on other vessels to suit their own convenience, 839, note 72.

WEIGHING—

Goods still deemed in transit for purpose of stoppage *in transitu* if they must be weighed before consignee is entitled to their possession, 767.

WEIGHING MACHINE—

Stumbling over, on station platform, 940.

WEIGHT—

Conclusiveness of bill of lading as to weight of goods, 163-166.

Rule when freight is to be computed according to weight of goods, 812.

WEIGHT UNKNOWN—

Effect of these words in bill of lading, 165, 166.

[REFERENCES ARE TO SECTIONS.]

WHARF—

- Constructive delivery to carrier on dock or wharf, 115.
- Delivery on dock or wharf near boat to carrier should be accompanied by notice to carrier, 117.
- Delivery upon carrier's wharf must be to duly authorized agent of carrier, 120.
- Delivery by railroad company on wharf of steamship company, 137.
- Company transporting partly by land and partly by water not obliged to allow competitor use of its wharf, 568.
- At what wharf delivery must be made by carrier by water, 698.
- Effect of usage on choice of wharf, 698.
- Provision in charter party or bill of lading for "customary dispatch" includes usages as to order in which vessels must come up to the wharf, 839.
- Provision that vessel shall load or discharge "as fast as steamer can deliver" not complied with by providing wharf at which only one of several hatches can be used, 840.
- In absence of customer, reasonable rate of discharge is not necessarily the same at all wharves, 842, note 15.
- If bill of lading fails to designate wharf or berth, vessel's right to precedence subject to consignee's designation of wharf, 847.
- But consignee not thereby given an arbitrary right, 847.
- Rights of master at wharf of assignee of bill of lading do not differ from his rights at wharf of consignee, 853, note 56.
- Duty of passenger carrier by water as to wharves and approaches, 942.
- Stepping into hole on wharf, 942.
- Roadways and bridges leading to wharf, 942.
- Right of railway company to grant exclusive access to its terminal wharf to favored steamboat line, 946.

WHARF BOAT—

- When carrier liable although the immediate cause of injury is the negligent collision of another boat with wharf boat over which passenger had to pass, 913, note 34.
- Carrier liable for injury from leaving hatchway open in hulk used by him in embarking passengers, 916.

WHARFINGERS—

- Lien of, 46.
- When common carriers, 71.
- When possession of wharfinger will defeat vendor's right of stoppage *in transitu*, 769.

[REFERENCES ARE TO SECTIONS.]

WHEAT—

When carrier not bound to suspend voyage to dry wheat, 647.

WHEEL—

Liability of passenger carrier for latent defect in wheel of vehicle, 905.

WHIP LASHES—

Duty to maintain, near overhanging structures or bridges, 954.

WHOLESALE RATES—

Under Interstate Commerce Act, 543.

Car load is usually taken as the unit in fixing freight rates, 544.

WIDOW—

May recover for injury to body of her deceased husband, 1375.

May recover for distress of mind occasioned by delay in shipment of body of her deceased husband, 1375.

Remarriage of, not to be considered in abatement of damages in actions for death by wrongful act, 1397, note 28.

WIFE—

Notice of arrival of goods by carrier by water to consignee's wife, 690, note 15.

Purchase of ticket for, by husband, 1062, note 19.

Recovery of husband for wife's services at common law, 1379.

Action by wife, effect of husband's contributory negligence on, 1382.

WIND—

Whether cessation of wind is act of God, 272.

Whether squall of wind is act of God, 275, 276.

Whether gale of wind is act of God, 277, 280, 286.

WINDOW—

Escape of wild animals through window of car, 333, note 7.

Passenger carrier not liable where fellow passenger allows window to suddenly fall on passenger's hand, 900, note 25.

Liability of passenger carrier for defective fastening on window of vehicle, 911.

Injury to passenger's hands or fingers by sudden closing of window, when negligence, 927.

Passenger voluntarily sitting beside open window through which sparks are entering, chargeable with contributory negligence, 1194.

But not, where danger not reasonably to be anticipated, 1194, note 23.

[REFERENCES ARE TO SECTIONS.]

WINDOW—con.

Passenger protruding arm through, whether contributory negligence, 1209, *et seq.*

Passenger protruding head through, chargeable with contributory negligence, 1215.

No excuse that passenger was irresistibly compelled to vomit, 1215, note 16.

“WITH ALL DISPATCH AS CUSTOMARY”—

In charter party, meaning of, 839.

“WITH CUSTOMARY DISPATCH”—

Use of such words in charter party, 837.

“WORKING DAYS”—

Means running or calendar days on which law permits work to be done, 837.

Excludes Sundays and legal holidays, but not stormy days, 837.

Does not include time taken by laymen in attending funeral, or cessation of work on Good Friday, 837.

WORMS—

Injury to vessel from worms not a peril of the sea, 490, note 65.

WRIT (see LEGAL PROCESS)—

WRONG PERSON—

Delivery to, is a conversion, 668.

How when carrier holds goods as warehouseman, 681-684.

Delivery to wrong person, and paying true owner, carrier may recover value of goods from person to whom delivered, 863.

WRONG PLACE—

When delivery at wrong place is deemed a conversion, 680.

If goods carried to wrong destination, or over wrong route, by fault of shipper or his agent, final connecting carrier is entitled to his lien, 867.

WRONG TRAIN—

Passenger by mistake on wrong train is not a trespasser, 1002.

Should be carried to place reasonably safe and convenient to get upon proper train, 1002.

Person getting on train in good faith with supposedly proper ticket is not a trespasser, 1002.

But duty of railroad company ceases when person on wrong train voluntarily leaves train at place other than a station and proceeds along railroad track, 1002, note 26.

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